(1)

Supreme Court, U.S.
FILED

No. 02 500 SEP 26 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

JEAN A. MARTIN
ATLANTIC RICHFIELD COMPANY
333 South Hope Street
Los Angeles, CA 90071
(213) 486-0761
Counsel for Petitioner Atlantic Richfield Company

CHARLES G. LAMBERT
CHEVRONTEXACO CORPORATION
2613 Camino Ramon
San Ramon, CA 94583
(925) 973-4546
Counsel for Petitioner Texaco, Inc.

CARTER G. PHILLIPS*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

KATHERINE L. ADAMS
DAVID H. BECKER
SIDLEY AUSTIN BROWN & WOOD LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
Counsel for Petitioners Atlantic Richfield Company and Texaco, Inc.

* Counsel of Record

September 25, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

161 pp

QUESTION PRESENTED

Whether the United States is liable as a party who "arranged" for the disposal of hazardous waste under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act when, in the exercise of its war powers, the United States exerted pervasive and coercive control over the manufacture of aviation gasoline necessary for World War II military operations and deprived the manufacturers of the resources necessary properly to dispose of hazardous waste generated in the manufacturing process.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioners state that the parties to the proceedings below were the United States of America, the State of California *ex rel.* California Department of Health Services, Hazardous Substance Account and Hazardous Cleanup Fund, Shell Oil Company, Union Oil Company of California, Atlantic Richfield Company, Texaco, Inc., Los Coyotes Estates Ltd., Ramparts Research & Financial Corporation, and Mcauley LCX Corporation.

Pursuant to Supreme Court Rule 29.6, Petitioner Atlantic Richfield Company states that its parent company is BP America Inc., which owns all the common stock of Atlantic Richfield Company. Petitioner Texaco, Inc. states that its parent company is ChevronTexaco Corporation, formerly known as Chevron Corporation, which owns all the common stock of Texaco, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULES 14.1 AND 29.6	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
1. Factual Background	3
2. Decisions of the District Court	11
3. Decision of the Court of Appeals	14
REASONS FOR GRANTING THE PETITION	15
I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS CONCERNING THE APPROPRIATE TEST FOR CERCLA "ARRANGER" LIABILITY WHERE A PARTY EXERCISES PERVASIVE CONTROL OVER MANUFACTURING BUT DOES NOT DIRECTLY DISPOSE OF HAZARDOUS WASTE	16
II. THE ISSUE RAISED IS IMPORTANT BECAUSE OF THE EXTENSIVE AND PERVASIVE UNITED STATES INVOLVEMENT IN MANUFACTURING DURING WARTIME	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Axel Johnson, Inc. v. *Carroll Carolina Oil Co.*, 191 F.3d 409 (4th Cir. 1999) 25
Cadillac Fairview/California, Inc. v. *United States*, 41 F.3d 562 (9th Cir. 1994) 19, 25
Carson Harbor Vill., Ltd. v. *Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) 25
Commander Oil Co. v. *Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000) 25
Concrete Sales & Servs., Inc. v. *Blue Bird Body Co.*, 211 F.3d 1333 (11th Cir. 2000) 22, 23
Florida Power & Light Co. v. *Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990) 25
FMC Corp. v. *United States Dep't of Commerce*, 786 F. Supp. 471 (E.D. Pa. 1992), *aff'd* 10 F.3d 987 (3d Cir. 1993), *opinion and judgment vacated, reh'g granted, aff'd and aff'd in part by an equally divided court*, 29 F.3d. 833 (3d Cir. 1994) 19
Franklin County Convention Facilities Auth. v. *American Premier Underwriters, Inc.*, 240 F.3d 534 (6th Cir. 2001) 25
General Elec. Co. v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992) 22
Geraghty & Miller, Inc. v. *Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000) 23, 25
Hercules, Inc. v. *United States*, 516 U.S. 417 (1996) 29
Mobil Oil v. *United States*, 530 U.S. 604 (2000) ... 29
New Jersey Tpk. Auth. v. *PPG Indus., Inc.*, 197 F.3d 96 (3d Cir. 1999) 24
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989) 25
Redwing Carriers, Inc. v. *Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996) 23

TABLE OF AUTHORITIES – continued

Page

South Florida Water Mgmt. Dist. v. *Montalvo*, 84 F.3d 402 (11th Cir. 1996) 22
United States v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989) 12, 17, 20, 25
United States v. *Bestfoods*, 524 U.S. 51 (1998) 24
United States v. *CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) 24
United States v. *Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001) 20
United States v. *Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990) 25
United States v. *Kayser-Roth Corp.*, 272 F.3d 89 (1st Cir. 2001) 25
United States v. *Mottolo*, 605 F. Supp. 898 (D.N.H. 1985) 25
United States v. *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) 17, 18, 19, 25
United States v. *Occidental Chem. Corp.*, 200 F.3d 143 (3d Cir. 1999) 19
United States v. *Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982) 26
United States v. *TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995) 21
United States v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) 21
United States v. *Winstar Corp.*, 518 U.S. 839 (1996) 29

STATUTES

42 U.S.C. § 9607 ..... 2, 10, 11
§ 9613 10
§ 9620 ..... 11, 26

TABLE OF AUTHORITIES – continued

LEGISLATIVE HISTORY Page

More Emphasis Needed on Risk Reduction: Testimony Before the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the House Comm. on Gov't Reform and Oversight, GAO/T-RCED-96-168 (1996) 28

88 Cong. Rec. 32 (1942) 4

SCHOLARLY AUTHORITIES

John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies & Procedures*, 13 Geo. Wash. L. Rev. 1 (1944) 27, 28

Nancy Perkins Spyke, *From War Strategy To Waste Strategy: The Validity of Government CERCLA Liability For War Production Site Cleanups*, 4 N.Y.U. Envtl. L.J. 263 (1995) 28

IN THE

Supreme Court of the United States

No. 02-

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

Petitioners Atlantic Richfield Company and Texaco, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on February 11, 2002, then withdrawn and replaced by a new opinion on June 28, 2002. The June 28, 2002 opinion is reported at 294 F.3d 1045 (9th Cir. 2002) and is reprinted in the Appendix to this Petition ("App.") at 1a-30a. The district court decision pertaining to "arranger" liability, which the court of appeals reversed, was entered as a summary judgment ruling on September 18, 1995, is unpublished, and is reprinted in App. at 31a-47a. Also reproduced are related decisions of the district court: a summary judgment holding the Oil Compa-

nies liable for waste disposal arrangements, entered on September 28, 1993, which is reported at 841 F. Supp. 962 (C.D. Cal. 1993) and is reprinted in App. at 84a-107a; a decision affirming liability and allocating costs to the United States after trial, entered on August 11, 1998, which is reported at 13 F. Supp. 2d 1018 (C.D. Cal. 1998) and is reprinted in App. at 57a-83a; a decision denying the United States's motion for new trial, entered on November 4, 1998, which is unreported and is reprinted in App. at 55a-56a; and the final judgment of the district court and attached stipulation of the parties, entered on October 13, 1999, which are reprinted in App. at 48a-54a.

JURISDICTION

The court of appeals entered its decision on February 11, 2002. Petitioners Atlantic Richfield Company and Texaco, Inc., together with defendants-appellees/cross-appellants Shell Oil Company and Union Oil Company of California (the "Oil Companies"), filed a Petition for Panel Rehearing and Rehearing En Banc, and the United States of America filed a Petition for Panel Rehearing, both of which were denied in the revised opinion filed on June 28, 2002. See App. 2a-3a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented concerns Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a) ("CERCLA § 107(a)"), which is reproduced in App. at 108a-109a.

STATEMENT OF THE CASE

The important question raised by the decision below is whether the United States, in the exercise of its wartime powers, can be liable as a party which "arranged" for the disposal of waste under 42 U.S.C. § 9607(a)(3) ("CERCLA

§ 107(a)(3)") where the United States maintained pervasive control over manufacturing at private facilities of materials necessary for the war effort, manufacturing that required the disposal of hazardous waste. Although the United States did not itself own the raw or intermediate products involved in the manufacturing process and did not directly arrange to dispose of hazardous waste generated in that process at a particular landfill, the United States controlled the disposal in other ways. It ordered the facilities to increase production, made all important decisions concerning the allocation of resources necessary for production and disposal of the resulting waste, and was the exclusive ultimate purchaser of the wartime products created. Significantly, the United States also denied the private companies the resources necessary properly to dispose of the waste generated, resources unavailable at that time from any other sources.

The courts of appeals have taken fundamentally inconsistent approaches to deciding the level of control over waste disposal required for imposition of CERCLA arranger liability. The proper interpretation of this provision of CERCLA has substantial implications for the allocation of cleanup liability throughout the country. The United States has been extensively involved in organizing wartime production efforts, and there are many hazardous waste disposal sites at which this issue has arisen and potentially will arise. Moreover, the scope of government liability will affect private conduct in the future, including the United States effort to prosecute the current War on Terrorism, or in future wars.

1. Factual Background

This case involves the disposal of hazardous waste at a site (the "McColl Site") in California used during World War II

and the determination, nearly 60 years later, of who should bear the responsibility for cleaning up this Site.[1]

The conditions in the United States between 1941 and 1945 were unprecedented in our history: the nation was engaged in a foreign war involving the total commitment of all elements of our society to prevail in a world war. Unlike the First World War, it was not a war being fought "over there": United States involvement began with an enemy strike against our sovereign territory that signaled the beginning of the War in the Pacific. Our nation entered the European theater as Nazi expansion reached its height. To meet these threats, President Franklin Roosevelt announced to the Congress in January, 1942 that

> [t]he superiority of the united nations in munitions and ships must be overwhelming – so overwhelming that the Axis nations can never hope to catch up with it. In order to attain this overwhelming superiority, the United States must build planes and tanks and guns and ships to the utmost limit of our national capacity.... We must strain every existing armament producing facility to the utmost. We must convert every available plant and tool to war production.

88 Cong. Rec. 32, 33-34 (1942) (State of the Union Address).

To achieve these goals, the United States instituted extraordinary controls over the production and procurement of critical war goods. In 1942 the government established the War Production Board ("WPB") to coordinate manufacture and delivery of products essential to the war effort. Because of the importance of fuel for aircraft, ships and motor vehicles, the Petroleum Administration for War ("PAW") was created to maximize fuel output. See App. 4a-6a, 60a-65a.

---

[1] The facts recited here are taken from the stipulations entered into by the parties and the decisions below. The decisions and all relevant stipulations are reprinted in the Appendix to this Petition.

These agencies directed raw materials to plants that could most efficiently use them for producing goods required by the armed forces, and set increasingly-higher production targets for refined petroleum products as the war progressed. The WPB and PAW had extraordinary powers to enforce their directives: they could compel refiners to increase their existing capacity to produce certain fuels, command the allocation of raw materials needed for production, order a refinery to increase production, and could and did seize plants that refused to cooperate with agency directives or where labor or other disputes threatened to disrupt fuel production. See *id.* at 4a-8a, 63a-65a, 111a-112a.

World War II was the first international war in which superiority of air power proved determinative. From the Battle of Britain to the Battle of Midway to the final attacks against Germany and Japan prior to their capitulation, control of the air by allied air forces dictated the outcome of the war. To fuel planes that were created in unprecedented numbers, it was critical that the United States increase its production of high-octane aviation gasoline – commonly known as "avgas" – which permitted Allied aircraft to operate more efficiently than their Axis counterparts. The WPB and PAW placed production of avgas among the top priorities for domestic industry throughout the war. Indeed, 100-octane avgas was the single most critically needed refinery product during the war. See App. 110a.

Avgas was a blend of ordinary gasoline and various chemical additives, most of which were derived by treating different petroleum distillates with sulfuric acid. The most common additive was called "alkylate," produced by combining lighter-weight petroleum fractions with 98% pure sulfuric acid in a process called "alkylation." See App. 110a-111a. Spent alkylation acid from this process was about 87-90% pure. See *id.* at 115a. The spent acid could be 1) reprocessed to 98% purity for re-use in the alkylation process, 2) used to

treat other avgas additives and other refinery products,[2] 3) sent off-site for use in fertilizer manufacture or for disposal, or 4) mixed with fuel oil at the refineries and burned in refinery boilers or in collection ponds. See *id.* at 6a-8a, 115a-116a, 118a. The byproduct of the treatment of other avgas additives and other refinery products was known as "acid sludge" and contained approximately 45-65% acid. Acid sludge was more difficult to reprocess to a purity that would make it useable for further acid treatment, but it could be used in fertilizer manufacturing, or disposed in the same manner as spent alkylation acid. See *id.* at 115a-116a.

Between February and May, 1942, the Oil Companies entered into contracts with the Defense Supply Corporation ("DSC") to provide avgas to the United States. The contracts required the Oil Companies to make substantial investments in new equipment to increase avgas production, partially financed by loans from the United States. See App. 6a-8a, 112a. Oil Company profits, fixed by the contracts, were approximately 7%. See *id.* at 112a. Although the Oil Companies entered into the contracts voluntarily, the United States's demand for avgas was so great during the war that a tremendous array of regulations, orders, and restrictions

---

[2] Among the other petroleum products that were acid-treated during the war was benzol, a petroleum derivative used as a raw material to manufacture cumene, which in turn was a significant avgas component. *See* App. 55a-56a. The benzol was owned by the United States, shipped to Oil Companies for acid treatment, then returned to the United States. The process for treating benzol, like other uses of acid in the refineries, produced acid sludge. The courts below recognized a distinction between acid waste resulting from the treatment of government-owned benzol ("benzol waste") and acid waste resulting from other uses of acid at the refineries, primarily avgas production ("non-benzol waste"). The United States admitted it is liable for arrangements to dispose of government-owned benzol waste at the McColl Site, and the trial and appellate courts both allocated 100% of the costs arising from benzol wastes to the United States. *See id.* at 23a-29a, 55a-56a, 67a-70a. This petition concerns the government's liability for the "non-benzol waste."

evolved by which the United States ultimately directly controlled production levels and related functions at the manufacturing facilities and took away the Oil Companies' discretion to choose any disposal option for the avgas waste other than disposing of it in a landfill.

The military requirement for avgas exceeded available production capacity until after the war in Europe ended in 1945. See App. 119a. To maximize avgas production, the PAW instituted the Planned Blending Program in February 1943. Under this program, refineries (including those owned by the Oil Companies) were required to ship particular avgas additives to other refineries, at the direction of the PAW. See *id.* at 33a-35a, 113a-114a. Plants that refused to comply with planned blending assignments were subject to enforcement orders, and refiners could not change their blend of components without express approval from the PAW.[3] See *id.* at 63a-65a.

In December 1942, the DSC instructed the Oil Companies that they were to take instructions from the PAW on the rate of production, stating that any contractual provisions with DSC that conflicted with PAW instructions were considered waived. See App. 113a. If companies did not achieve maximum avgas production or comply with federal directives,

---

[3] The Ninth Circuit, in describing the facts of this case, characterized the government planning of manufacture, distribution, and blending of avgas components by stating that under the Planned Blending Program "the government *assisted* the refineries" to maximize production of avgas. App. 6a (emphasis added). The court's implication that the government was not actively and directly involved in determining exactly what avgas constituents were to be shipped where, when, and by whom, is factually inaccurate. It ignores the stipulation of the parties and the district court's express findings that "[i]t is undisputed that the Government, on a regular basis, controlled the specifications, quantities, delivery, and price of avgas" and that "[t]he undisputed facts reveal that the actions of the United States resulted in, as a practical matter, almost total control over the production of avgas." *Id.* at 45a.

the United States could and would seize the refinery, shut it down, or divert labor and materials to more productive and cooperative facilities. See *id.* at 63a-65a, 113a. As a result of these orders, avgas production rose from 40,000 barrels per day at the outset of the war to 514,000 barrels per day by war's end. See *id.* at 114a-115a.

Not surprisingly, along with the dramatic increase in avgas production came a tremendous surge in the use of sulfuric acid at the refineries. Sulfuric acid use at the Shell refinery in Los Angeles alone increased from 24 million to 120 million pounds per year from 1941 to 1944. See App. 115a. The vast majority of the sulfuric acid used by the Oil Companies during the war was used to produce alkylate to be blended into avgas. For example, 91% of the Shell Wilmington refinery's acid use went to alkylation by war's end. See *id.* There was a corresponding dramatic increase in the volume of spent alkylation acid and acid sludge with which refiners had to cope. Excess spent alkylation acid and acid sludge threatened to halt avgas production. See *id.* at 8a-10a, 87a-89a.

Prior to the war, the Oil Companies had disposed of acid sludge that could not be reprocessed at the refineries in one of three ways: 1) shipping it by tank car for use at a fertilizer manufacturing plant; 2) shipping it to nearby reprocessing facilities; or 3) in small volumes, disposing of it in landfills or by burning. See App. 74a-76a, 118a. As avgas production rose, the refineries' existing capabilities to burn or reprocess acid waste were quickly overwhelmed.[4]

---

[4] The Ninth Circuit's statement that "the Oil Companies had other disposal options for their acid waste," App. 29a, is not supported by the record on appeal. There is no evidence that any Oil Company other than Shell Oil dumped acid waste prior to the war. *See id.* at 117a-118a. Acid waste dumping ceased when wartime production controls ceased and reprocessing alternatives again became available. *See id.* at 76a-79a. Furthermore, each of the refineries at issue was located in a populated area of Los Angeles. Attempts to burn the significantly increased volume of acid on refinery property generated acidic air emissions that resulted in

The Oil Companies and PAW sought alternatives, but the United States controlled access to all resources (including steel and transportation services) needed to safely handle the increased waste volume. The United States determined that such resources were needed to support other aspects of the war effort. As a consequence, during the war, there was a chronic shortage of tank cars available for transporting acid waste to off-site facilities that could reprocess the waste or put it to other uses. The United States controlled access to these tank cars and it refused to allow the Oil Companies to purchase tank car services for what it determined was a low-priority use. See App. 74a-79a, 117a. The WPB also declined to authorize the use of strategic resources necessary to build new acid reprocessing facilities. See *id.* at 116a. An attempt by the United States late in the war to rent a storage tank for excess acid waste did not provide sufficient capacity to solve the problem. See *id.* at 45a-46a.

After the United States foreclosed all possible methods of storing, reprocessing, or reusing the acid waste, the Oil Companies were forced to dump acid waste, contracting with Eli McColl to transport waste from the refineries and to dump it at the McColl Site landfill. See App. 65a-67a. The McColl Site was in operation from 1942 to 1946 and existed solely for the disposal of acid waste from refineries generated during the war. At the end of the war, once the PAW relaxed its control over the Oil Companies' operations and again allowed access to acid waste handling alternatives, shipment of acid sludge by tank car to a fertilizer plant resumed on a large scale and dumping at the McColl Site ceased. See *id.* at 8a-10a, 76a-79a.

The McColl Site was contaminated with approximately 100,000 cubic yards of sulfuric acid waste – some as spent alkylation acid, some as acid sludge from the treatment of

---

health and nuisance complaints. The practice was quickly discontinued. *See id.* at 118a-119a.

government-owned benzol, some as acid sludge from the treatment of other avgas additives and other refinery products. See App. 65a-67a. The Oil Companies remediated the McColl Site in the 1990s, eventually incurring nearly $65 million in response costs.[5] See *id.* at 52a.

CERCLA § 107(a)(3) provides that "any person who by contract, agreement, or otherwise arranged for disposal or treatment ... of hazardous substances owned or possessed by such person, by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances" shall be liable for all response costs incurred to clean up hazardous waste. 42 U.S.C. § 9607(a)(3). In 1991, the United States and the State of California sued the Oil Companies and other potentially responsible parties ("PRPs") under CERCLA § 107(a)(3), claiming that the Oil Companies arranged for the disposal of hazardous waste at the McColl Site. The Oil Companies counterclaimed against the United States for contribution under 42 U.S.C. § 9613 ("CERCLA § 113"). The Oil Companies argued that the United States was also liable as an "arranger" pursuant to CERCLA § 107(a)(3) due to its pervasive wartime control over the manufacture of avgas at the Oil Companies' plants and for denying the Oil Companies the necessary resources properly to dispose of the waste acid generated in the production of unprecedented levels of wartime avgas.

---

[5] The Ninth Circuit's statement that "[t]he government began removing this waste from the site in the 1990s, at an eventual cost of close to $100 million," App. 9a, is inaccurate to the extent it suggests that the United States paid the entire cost of the cleanup. In fact, the Oil Companies performed the cleanup and the United States directly incurred oversight costs, which amounted to $18 million through June 1990. The parties did not stipulate to the amount of oversight costs after June 1990. *See id.* at 49a-50a.

2. Decisions of the District Court

In 1993, the district court granted summary judgment to the United States holding the Oil Companies liable as arrangers under CERCLA § 107(a)(3). See App. 104a-106a. In 1995, the Oil Companies moved to hold the United States liable as an arranger for disposal at the McColl Site.[6]

Prior to the court's consideration of the Oil Companies' motion, the parties agreed to 430 stipulations of fact. Based on these stipulated facts, the district court found that the United States "pervasively regulated the petroleum industry during World War II, as well as the modes of available transportation within the country, including railroad tank cars." App. 33a. In addition, the court found that the United States, through the PAW, "instituted a blending program by which it required quarterly inventory reports from all refineries, authorized purchase of certain quantities of raw materials, and instructed refineries with respect to manufacturing specifications. The PAW had approval power over prices of components" needed to produce avgas and "also controlled the available modes of transportation for the raw and finished materials." *Id.* at 34a. The district court concluded that:

> the Government's control, even daily control, over the output of avgas produced by the Oil Company defendants, was pervasive and omnipotent. The Government, through its various departments, boards and commissions, coerced the Oil Companies into producing avgas, knowing full well that the acid sludge would be dumped.

---

[6] In the district court, the Oil Companies also raised CERCLA's act of war defense, 42 U.S.C. § 9607(b)(2), and the United States countered that it was immune from suit under CERCLA on the basis of sovereign immunity. The district court found the act of war defense inapplicable, *see* App. 93a-100a, and found that 42 U.S.C. § 9620(a)(1) waived the United States's sovereign immunity, *see id.* at 35a-38a. The Ninth Circuit affirmed these holdings. *See id.* at 8a-15a, 23a-30a. These issues are not presented in this petition.

> Undisputed evidence presented to this Court exists that during the relevant times the Government knew acid wastes were being dumped, and the Government attempted to divert the wastes, but its efforts were ultimately unsuccessful. When it was either unable or unwilling to allocate resources for the proper disposal of the wastes, the Government turned a blind eye to the problem. This is exactly the conduct that Congress intended to condemn, albeit retroactively, when it enacted CERCLA.

Id. at 45a.

The district court analyzed these facts under a test for CERCLA arranger liability first articulated in *United States* v. *Aceto Agricultural Chemical Corp.*, 872 F.2d 1373, 1379-80, 1382 (8th Cir. 1989). According to the district court, applying the Eighth Circuit's *Aceto* standard, a party is liable as an arranger "(1) if it supplies raw materials to be used in making a finished product, (2) and it retains ownership or control of the work in process, (3) where the generation of hazardous substances is inherent in the production process." App. 43a.[7] The court found that the United States was "'*supplying*' the raw materials within the meaning of *Aceto*" and controlled the production of avgas. *Id.* at 45a (emphasis in original). On the basis of the undisputed facts and the *Aceto* standard, the district court held the United States liable as an arranger for disposal of hazardous waste under CERCLA § 107(a)(3).

The district court found additional support for this determination by noting that the factual record showed that the United States "began to arrange for the disposal of acid wastes, by undertaking the responsibility for disposing of the sludge." App. 45a. Government employees attempted to obtain priority use for tank cars needed to ship acid waste to a

---

[7] The district court distinguished *Aceto*-type liability from circumstances where "the sole purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes." App. 42a.

plant that could use it in fertilizer production, but the government did not obtain enough tank cars to handle all the waste. The government also directed its employees to lease a storage tank to hold acid temporarily, until other disposal options might become available, but the tank was not adequate to hold all the waste at issue. See *id.* Consequently, the trial court found that the government failed to follow through on its disposal responsibilities, and that "[t]he case law certainly supports the proposition that once an entity undertakes to arrange for disposal or treatment, it cannot abdicate responsibility when the disposal becomes infeasible." *Id.* at 46a.

In 1998, after a trial on apportionment, the district court issued an opinion that reaffirmed the factual basis for arranger liability and allocated the cleanup costs at the McColl site between the Oil Companies and the United States. In this opinion the district court drew a distinction between the acid sludge from the processing of government-owned benzol, for which the United States admitted liability,[8] and other acid waste associated with the production of avgas, for which the government had contested liability. See App. 68a-70a. Benzol waste accounted for approximately 5.5% of the total acid waste at the McColl Site, with other waste making up the balance. See *id.* at 69a.

Among the critical reasons to support its allocation decision, the district court reiterated its findings that "the Oil Companies were unable to transport avgas waste [off-site] for recycling due to the unavailability of tank cars, and [that] the Oil Companies were unable to construct treatment plants due to the WPB's refusal to issue priorities." See App. 74a. The

---

[8] Early in the district court proceedings, the United States conceded it was liable as an "arranger" with respect to disposal of the acid waste associated with the acid treatment of government-owned benzol at the Shell refinery in Wilmington, California during the war. *See* App. 55a-56a.

court was "convinced that the Oil Companies had no reasonable recourse to on-land dumping of the sludge due to the conduct of the WPB," and concluded that "[g]iven the pattern of transport both before and after the war, one can be sure that had lead-lined tank cards been available throughout the war years, the Oil Companies would have made use of them." *Id.* at 76a, 77a. Based on these findings, the district court determined that it was equitable to allocate 100% of the cleanup costs related to all waste to the United States. See *id.* at 83a.

3. Decision of the Court of Appeals

The Ninth Circuit reversed the district court's holding regarding the United States's arranger liability for the non-benzol waste at the McColl Site. In so doing, the Ninth Circuit rejected the district court's conclusion that arranger liability could be based on the government's pervasive involvement in and control over avgas production and the resources needed to safely handle the resulting acid waste.

Addressing the Government's liability as an arranger, the Ninth Circuit stated that it "agree[d] with the Oil Companies and the district court that control is a crucial element of the determination of whether a party is an arranger under" CERCLA § 107(a)(3), but disagreed that "the government exercised the requisite control" in this case. App. 17a. After considering and distinguishing several other court of appeals decisions, including the Eighth Circuit's holding in *Aceto* that informed the district court's analysis, the Ninth Circuit reached a number of conclusions concerning the requisite control required for imposing arranger liability. First, the Ninth Circuit concluded that the United States had never "owned any of the raw materials or intervening products." *Id.* at 18a. Second, the Ninth Circuit held that "'authority to control'" waste disposal is not sufficient to support arranger liability. *Id.* at 20a-21a. Third, the Ninth Circuit found that the United States never "exercised actual control over any of the waste disposal at issue." *Id.* at 21a. In this regard, the court was apparently looking for evidence of direct control

over contracts to dispose of waste at the McColl Site, rather than control over resources needed to pursue other disposal options. The Ninth Circuit went on to quote approvingly a 1995 district court decision that concluded, without regard to the significance of the World War, that "'[n]o court has imposed arranger liability on a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue.'" *Id.* at 22a. On this basis, the court held that the government's degree of control in this case was insufficient to support arranger liability.[9] This Petition, and a parallel Joint Petition for a Writ of Certiorari by Shell Oil Company and Union Oil Company of California (the "Shell Petition"), ensued.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's approach to arranger liability under CERCLA § 107(a)(3) liability is contrary to the tests adopted by five other courts of appeals and is inconsistent with settled doctrine for interpreting the language of CERCLA. This inconsistency alone warrants this Court's review. Moreover, this case presents an important issue of CERCLA liability which potentially affects the allocation of costs for hundreds of millions of dollars in response costs at hazardous waste disposal sites. This issue is particularly important as it relates to the responsibility of the United States in times of war or other international crisis and the risks to private parties who assist the United States in such times of need. The Court should therefore grant certiorari to clarify the proper standard to be applied in determining arranger liability under CERCLA.

---

[9] The Ninth Circuit rejected the United States's contention that CERCLA did not waive the government's immunity from suit. *See* App. 8a-15a.

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS CONCERNING THE APPROPRIATE TEST FOR CERCLA "ARRANGER" LIABILITY WHERE A PARTY EXERCISES PERVASIVE CONTROL OVER MANUFACTURING BUT DOES NOT DIRECTLY DISPOSE OF HAZARDOUS WASTE.

Prior to the Ninth Circuit's decision in this case, the courts of appeals had interpreted the scope of arranger liability under CERCLA expansively. Those courts have found liability to be warranted where there is a "but for" causal connection between the exercise of control and the waste disposal.

A. The Ninth Circuit's opinion adopts an approach to arranger liability that focuses narrowly on identifying specific touchstones showing direct control over arrangements to dispose of waste at a particular site, while ignoring evidence of indirect control. The court of appeals's opinion is turgid, but this is no reason to allow its harmful ruling to stand uncorrected. Although the Ninth Circuit rightly noted that "[t]here is no bright-line test, either in the statute or in the case law," for arranger liability under § 9607(a)(3), App. 17a, the court nevertheless adopted a constricted approach that requires one of two critical facts to hold a party liable as an arranger. Specifically, the Ninth Circuit held that arranger liability requires either: (1) ownership of raw materials or intermediate products at another's facility or (2) direct control of the disposal of hazardous waste at a particular location.

The Ninth Circuit did agree "with the Oil Companies and the district court that control is a crucial element of the determination of whether a party is an arranger under § 9607(a)(3);" it disagreed "with their conclusion that the government exercised the requisite control" during World War II. App. 17a. To explain the level of control required for finding arranger liability, the court of appeals then proceeded to analyze two seminal Eighth Circuit cases, which the district court found dispositive, and purported to distinguish them.

United States v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989); *United States* v. *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) ("*NEPACCO*").

The Ninth Circuit explained that "[t]he question in *Aceto* was whether pesticide manufacturers were arrangers and therefore liable for cleanup costs for contamination at the plant of a pesticide 'formulator,' Aidex Corporation. The pesticide manufacturers routinely shipped active pesticide ingredients to Aidex, which blended them with inert ingredients." App. 17a-18a. Hazardous waste was generated as an inherent part of the formulation process. The Ninth Circuit stressed that:

> [t]he manufacturers owned the pesticide ingredients and the commercial-grade pesticides at all times.... The Eighth Circuit held, under these circumstances, that the pesticide manufacturers were arrangers: "Aidex is performing a process on products owned by defendants for defendants' benefit and at their direction: waste is generated and disposed of contemporaneously with the process."

Id. at 18a (quoting *Aceto*, 872 F.2d at 1381).

The court of appeals also found that *Aceto* did not control this case because "the United States was in a materially different position in this case from the pesticide manufacturers in that case," acting "more like a customer of the pesticide manufacturers than like the manufacturers themselves" because the United States was the end purchaser of avgas. App. at 18a. Central to its determination that *Aceto* was inapplicable was the issue of ownership: the court emphasized that "the United States never owned any of the raw materials or intervening products. It never owned unrefined petroleum, refined gasoline, fresh sulfuric acid, spent acid, or alkylate or any additive." *Id.*

The Ninth Circuit also considered *NEPACCO*, an earlier Eighth Circuit case which involved the liability of corporate

officers as arrangers for disposal of hazardous wastes at one of the company's plants. The Eighth Circuit had held in *NEPACCO* that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." *NEPACCO*, 810 F.2d at 743. Ignoring the *NEPACCO* approach of finding liability where there is "authority to control," the Ninth Circuit read *NEPACCO* as holding only that corporate officers "may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the corporation, and the other officer has the authority to control the first officer." App. 20a-21a.

The Ninth Circuit then found that, in this case, "the United States neither exercised actual control, nor had the direct ability to control" the waste disposal, because "the waste never belonged to the United States" and "no official or employee of the United States ever exercised actual control over any of the waste disposal."[10] App. 21a. It is clear from this reading of *NEPACCO*, and its application to the stipulated facts of this case, that the Ninth Circuit requires a showing of: 1) ownership of the waste; or 2) direct control over waste disposal arrangements at a particular location before it will find arranger liability. See *id.* at 20a-21a.

In summarizing its view of *Aceto*, *NEPACCO*, and "the interrelationship of the factors of ownership, possession, and control over waste disposal," the court of appeals concluded

---

[10] In drawing these conclusions, the Ninth Circuit ignored the district court's finding, on stipulated facts, that "[t]he Government began to arrange for the disposal of acid wastes, by undertaking the responsibility for disposing of the sludge," App. 45a, as well as all of the facts found below evidencing the United States's indirect control over waste disposal, including coerced generation of waste in excess of what the refineries could handle, withholding of authorization for the construction of reprocessing plants, and denial of tank cars to move the waste off-site to facilities that could reprocess or otherwise safely handle the waste. *See id.* at 44a-47a, 74a-79a.

that "'[n]o court has imposed arranger liability on a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue.'" App. 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995))[11] This conclusion imposes a standard under which a party must own the materials being processed, or employ direct, hands-on control over the arrangements to dispose of hazardous waste at a particular location to be liable as an arranger under CERCLA § 107(a)(3).[12] This position may be a convenient

---

[11] The court's statement is incorrect. In 1992 the District Court for the Eastern District of Pennsylvania did impose arranger liability on the United States despite the government having no ownership of the raw materials being processed nor control over the disposal of the hazardous waste generated. The Third Circuit affirmed this decision without opinion. *See FMC Corp.* v. *United States Dep't of Commerce*, 786 F. Supp. 471, 486 (E.D. Pa. 1992), *aff'd* 10 F.3d 987 (3d Cir. 1993), *opinion and judgment vacated, reh'g granted, aff'd and aff'd in part by an equally divided court*, 29 F.3d 833 (3d Cir. 1994) (en banc). The Ninth Circuit incorrectly relied on *FMC* in its opinion, because neither the district court opinion nor the Third Circuit's *en banc* opinion in *FMC* discusses the applicable legal standard for arranger liability. Indeed, after *FMC*, the Third Circuit has expressly noted that the circuit has "neither accepted nor rejected" the *Aceto* theory of liability. *United States* v. *Occidental Chem. Corp.*, 200 F.3d 143, 145 n.1 (3d Cir. 1999).

[12] To the extent the Ninth Circuit's opinion, which is somewhat opaque, may be read as requiring *both* ownership of raw materials *and* direct control over waste disposal, it is flatly inconsistent with the Eighth Circuit's holding in *NEPACCO* that constructive ownership of hazardous waste is sufficient to impose arranger liability. *See NEPACCO*, 810 F.2d at 743 (finding liability in the absence of ownership and explaining that "requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under [CERCLA § 107(a)(3)] would be inconsistent with the broad remedial purposes of CERCLA"); *see also Cadillac Fairview/California, Inc.* v. *United States*, 41 F.3d 562, 565 (9th Cir. 1994) (holding that "[l]iability is not limited to those who own the hazardous substances" and noting that the Ninth Circuit had "extended liability under section 107(a)(3) to persons who have sold and therefore no longer own the hazardous substances ... and to

one for the United States in this case, but it is inconceivable that the United States Environmental Protection Agency would take the same position if the potential arranger were a private party.

B. All other circuits that have addressed the standard for determining who is an arranger have found that a party may be liable as an arranger if there is a "but for" causal nexus between its actions and the arrangement for disposal of hazardous waste. One of the primary purposes of CERCLA is to make responsible parties bear the cost of correcting environmental conditions caused, directly or indirectly, by their actions. Outside the Ninth Circuit, this principle is widely recognized in arranger liability jurisprudence.

As the district court explained, the Eighth Circuit has developed the most comprehensive arranger liability jurisprudence. Beginning with *NEPACCO* and *Aceto*, the Eighth Circuit has recognized that CERCLA § 107(a)(3) liability may attach even where the arrangement for treatment and disposal of waste was not the purpose of a transaction between parties. Both of these cases expanded the traditional understanding of arranger liability to ensure that parties substantially connected with the manufacturing process do not "simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA." *Aceto*, 872 F.3d at 1382. Since the late 1980s when these cases were decided, the Eighth Circuit has further widened and refined its test for arranger liability.

Consistent with the approach of other circuits, the Eighth Circuit has stated that "[i]n deciding questions of arranger liability, we do not rely on bright-line rules but look to the totality of the circumstances to determine whether the facts of a given case fit within CERCLA's 'overwhelmingly remedial scheme.'" *United States* v. *Hercules, Inc.*, 247 F.3d 706, 721

---

persons who have no control over the process leading to release of the substances.") (citations omitted).

(8th Cir. 2001). Thus, "a finding of arranger liability requires some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal of hazardous substances or the off-site disposal itself." *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1087-88 (8th Cir. 1995). Under this standard, a party is liable as an arranger if it "had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances." *Id.* at 1089; see also *id.* at 1090 n.7 ("[t]o establish arranger liability, the exercise of control must be causally related to the arrangement for disposal, or the off-site disposal.") Under this standard the United States unquestionably would be liable as an arranger under CERCLA.

The Eighth Circuit recognizes that a party's substantial involvement, even indirectly, in activities that affect the arrangements for disposal of hazardous waste give rise to arranger liability under CERCLA § 107(a)(3). See *id.* That circuit has further acknowledged that a significant level of government control over the operations of a facility and the arrangement for disposal of hazardous waste creates liability as an arranger. The Eighth Circuit concluded that "circumstances may exist where a government contract involves sufficient coercion or governmental regulation and intervention to justify the United States's liability as an arranger under CERCLA." *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir. 1995).[13] This is the situation presented in the McColl case.

The Second Circuit also has adopted a similar construction of the phrase "otherwise arranged for" in CERCLA

---

[13] The Eighth Circuit in *Vertac* noted that "the United States' actual involvement in the operations of the Jacksonville facility was sporadic and minimal," leading to the court's holding that there was insufficient evidence of control in that case. *Vertac*, 46 F.3d at 811.

§ 107(a)(3). Noting that "arranger liability can attach 'to parties that do not have active involvement regarding the timing, manner or location of disposal,'" the Second Circuit requires merely that "there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *General Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (quoting *CPC Int'l* v. *Aerojet-General Corp.*, 759 F. Supp. 1269, 1279 (W.D. Mich. 1991)). The "nexus is premised upon the potentially liable party's conduct with respect to the disposal or transport of hazardous wastes." *Id.* Because "Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers," the court of appeals concluded that arranger liability arises if there is "the *obligation* to exercise control over hazardous waste disposal." *Id.* (emphasis in original). Under the Second Circuit's standard, whether such obligation exists is based on the party's conduct as it relates to the disposal of hazardous waste. See *id.* at 286-87. Applying this test in this case again leads to a finding that the United States is an "arranger."

The test that has evolved for arranger liability in the Eleventh Circuit also considers a variety of factors to determine "whether there has been an 'arrangement' for disposal." *South Fla. Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996). Legally relevant factors include whether a party "made the 'crucial decision' to place hazardous substances in the hands of a particular facility," whether the party has "knowledge (or lack thereof) of the disposal," and whether the party owned the hazardous substances. *Id.* The Eleventh Circuit cautioned that courts must avoid using a bright-line test to determine liability, and instead "must focus on all of the facts in a particular case." *Id.* None of the factors is dispositive or determinative of liability. See *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1336 (11th Cir. 2000); *Montalvo*, 84 F.3d at 407.

Furthermore, the Eleventh Circuit's standard recognizes "the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise under 42 U.S.C. § 9607(a)(3)." *Concrete Sales & Servs.*, 211 F.3d at 1339. The Eleventh Circuit contemplates that a party's failure to take an action which it had a duty to take could be the basis of a claim for arranger liability. See *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1506 n.23 (11th Cir. 1996). Nothing could more accurately characterize the government's conduct in this case.

The Fifth Circuit has also held that "just as a nexus must exist for operator liability to attach, there must also be a nexus that allows one to be labeled an arranger." *Geraghty & Miller, Inc.* v. *Conoco Inc.*, 234 F.3d 917, 929 (5th Cir. 2000). The court reversed and remanded a grant of summary judgment finding no arranger liability on the part of a contractor which moved hazardous waste within a site and whose subcontractor may have exacerbated the migration of waste. See *id.* Citing the Second Circuit's opinion in *General Electric*, the Fifth Circuit ordered that on remand a determination of arranger liability required the consideration of "the totality of the circumstances." *Id.* (quoting *General Elec.*, 962 F.2d at 286).

Finally, although the Third Circuit has never issued an opinion analyzing arranger liability,[14] it has considered the issue in the context of the burden of proof required to establish such liability. The Third Circuit held that a CERCLA plaintiff attempting to prove defendants were arrangers had to show a connection between the actions of the defendants and the contamination at the site, terming this a "nexus" requirement. To sustain the burden, the court required that the plaintiff offer proof that the defendants "deposited, or caused the disposal of" hazardous waste at the contaminated site.

---

[14] *See supra* note 11.

New Jersey Tpk. Auth. v. *PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999). Another Third Circuit decision recognized the possibility of liability as an arranger "because [a party] arranged for a process that (perhaps) necessitated disposal." *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 718 n.11 (3d Cir. 1996). Both of these cases read CERCLA as consistent with the expansive interpretation of "arranged for" in the Second, Fifth, Eighth, and Eleventh Circuits.

Contrary to the Ninth Circuit's narrow focus on actual ownership or direct control over the disposal arrangements, these five circuits are consistent in holding that a causal nexus between a party's conduct and the waste disposal is sufficient to establish arranger liability. Indeed, had this case been decided in those circuits, the result would have been different. The United States coerced and pervasively regulated and controlled the production of avgas during World War II. The United States's wartime demands first increased the magnitude of the waste problem, and then withheld from the Oil Companies the resources safely to ship away or reprocess the acid waste generated by increased avgas production. This exercise of control left the refineries with no option other than to dispose of the acid waste at the McColl Site. These facts certainly show the government's actions caused the disposal of the hazardous waste, and these facts would be sufficient to impose arranger liability upon the United States, in all circuits with established arranger tests other than the Ninth Circuit.

C. An interpretation of "otherwise arranged for" that focuses on the causal connection between a party's activities that affect the production of hazardous waste at another party's facility and the disposal of that waste is consistent with Congress's unmistakable purpose in passing CERCLA.

This Court has remarked on the sweeping nature of CERCLA. Under the broad reach of the statute, "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions.'" *United States* v. *Bestfoods*, 524 U.S. 51, 55-56

(1998) (quoting S. Rep. No. 96-848, at 13 (1980)). See also *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.).

The Eleventh Circuit recognized that "a liberal judicial interpretation of the term ["arranged"] is required in order that we achieve CERCLA's 'overwhelmingly remedial' statutory scheme." *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990). Other circuits have similarly stressed the importance of giving full meaning to CERCLA § 107(a)(3). See *Geraghty & Miller, Inc.*, 234 F.3d at 929; *Cadillac Fairview/California, Inc.* v. *United States*, 41 F.3d 562, 565 n.4 (9th Cir. 1194); *NEPACCO*, 810 F.2d at 733; *accord Aceto*, 872 F.2d at 1380 (one of the "essential purposes" of CERCLA is "'... that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'") (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)). See also *United States* v. *Kayser-Roth Corp.*, 272 F.3d 89, 93 (1st Cir. 2001); *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 880-81 (9th Cir. 2001); *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 546 (6th Cir. 2001); *Commander Oil Co.* v. *Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000); *Axel Johnson, Inc.* v. *Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999).

The United States, as a counterclaim defendant in this case, asked the Ninth Circuit to adopt a reading of the liability provisions of CERCLA that is inconsistent with the liability standards used throughout the rest of the United States. Ironically, as a plaintiff seeking to recover its cleanup costs, the United States has succeeded in convincing several courts that CERCLA liability must be construed more broadly to effectuate Congress's intent. See, *e.g.*, *Aceto*, 872 F.2d at 1382; *NEPACCO*, 810 F.2d at 742-43; *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990); *United*

States v. *Mottolo*, 605 F. Supp. 898, 903 (D.N.H. 1985); *United States* v. *Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982). Now the United States adopts the convenient position that arranger liability should be narrowly construed in this case. But there cannot be one test for the United States and another for all other potential arrangers. The United States is subject to CERCLA "to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607." 42 U.S.C. § 9620(a)(1). Thus, the Court needs to resolve this conflict to ensure consistency in the interpretation of CERCLA liability determinations.

The Ninth Circuit's test predicating arranger liability on ownership of raw materials or direct control over arrangements to dispose of hazardous waste does not comport with CERCLA's purpose to ensure that responsible parties who caused environmental contamination should pay for its cleanup. The court's unique construction of the CERCLA § 107(a)(3) liability provision will result in a party, such as the United States here, but also private entities such as parent companies in other cases, being able to evade liability as an arranger by carefully avoiding ownership of raw materials or direct involvement in contracts to dispose of hazardous waste at a particular location, while nonetheless maintaining pervasive and coercive control over manufacturing and the alternatives available for the reuse, treatment or disposal of hazardous waste.

D. This case raises important questions concerning the United States's involvement in controlling operations at wartime manufacturing facilities that have broader implications for CERCLA liability in cases involving contractual relationships between the United States and private parties, as well as for the applicability of CERCLA to the United States more generally. The analysis in the parallel Shell Petition in this case is based on the same stipulated facts and findings below and on the contention that the United States was

pervasively involved in the manufacturing of avgas and disposal of avgas waste. While the Shell Petition primarily focuses more generally on the level of government control necessary to find CERCLA liability, the analysis is fully consistent with the discussion of arranger liability in this Petition. Atlantic Richfield Company and Texaco, Inc. agree with that discussion and join in the arguments presented in the Shell Petition. Moreover, as both Petitions seek review of the same judgment below, in the event the Court chooses to grant certiorari on one Petition, both Petitions should be granted and the matters consolidated for review on the merits.

II. THE ISSUE RAISED IS IMPORTANT BECAUSE OF THE EXTENSIVE AND PERVASIVE UNITED STATES INVOLVEMENT IN MANUFACTURING DURING WARTIME.

The proper scope of arranger liability has important implications for the many hazardous waste disposal sites that resulted from government activities during World War II and other international conflicts. During World War II the United States was deeply and coercively involved in all aspects of production, procurement and use of critical war materials. These activities often resulted in the generation and disposal of hazardous waste at sites throughout the country. An account of United States involvement in private production, written during World War II by leading WPB officials, indicates that between 1941 and mid-1944 the WPB and the Office of Price Administration issued over three million priority certificates and 5,353 orders, regulations, and amendments. See John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies & Procedures*, 13 Geo. Wash. L. Rev. 1, 28 (1944). The authors boasted that:

> [a] free economy was changed to a regulated economy in the interest of the war effort with surprising speed and efficiency of operation. The system now in force regulates more than one hundred thousand transactions of the

> most diverse nature every week, controls the activities of more than 250,000 manufacturers, wholesalers and retailers, and has drastically altered the American industrial and distribution system.

Id. at 5. The extent of government intrusion into the day-to-day operation of crucial sectors of the economy has never been equaled, before or since the war. As a result of the priority placed on production, without regard to consequences to the environment, many sites exist throughout the United States where hazardous waste resulting from wartime manufacturing are being cleaned up years after the war ended.

No one can quarrel with the wisdom of the United States's response to the crisis of World War II. But the fact remains that the government is potentially liable for the cleanup of over 8,000 military sites, most of which were involved in the war effort during World War II. Hundreds of private companies also share responsibility for having responded to the government's call to arms during the war. See Nancy Perkins Spyke, *From War Strategy To Waste Strategy: The Validity of Government CERCLA Liability For War Production Site Cleanups*, 4 N.Y.U. Envtl. L.J. 263, 269 (1995). It is estimated that 3,200 such sites may enter the Superfund cleanup program in the future, dwarfing the approximately 1,300 sites already in the program. See *More Emphasis Needed on Risk Reduction: Testimony Before the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the House Comm. on Gov't Reform and Oversight*, GAO/T-RCED-96-168, at 1 (1996) (testimony of Stanley J. Czerwinski, Associate Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, General Accounting Office). The costs of cleaning up these has grown to $75 billion for private sites and up to $400 billion for federal facilities. See *id.*

At least 19 cases have been litigated that involve the issue of government involvement in hazardous waste disposal during wartime. These cases, which involve activities rang-

ing from chemical and machinery manufacturing to mining and oil refining to airport operations, are listed in App. at 120a-123a. While many of the cases have been settled without a conclusive determination of the government's arranger liability, a number of cases are still pending. In the pending cases alone, historical and future cleanup costs potentially exceed $1.5 billion.

Courts have recognized that arranger liability under CERCLA exists, in part, to prevent a party from contracting away its responsibility to dispose of hazardous waste in a responsible manner. The Ninth Circuit's rule in this case effectively permits the United States to do just that by entering into a manufacturing contract with a private party, then using its regulatory power, including the threat of plant seizure, to compel production without regard to the environmental consequences. The Ninth Circuit's decision has the potential to undermine the public-private partnership that proved so successful in defeating the Axis in World War II. Unless this decision is reversed, private businesses that cooperate with the government in wartime are subjected to the risk that they will bear the entire burden of wartime environmental harms and the government will be shielded from any share of responsibility.

Considerations of fairness in contractual relations between the government and private parties in wartime have prompted the Court to grant certiorari in other cases. See, *e.g.*, *Hercules, Inc.* v. *United States*, 516 U.S. 417 (1996) (determining whether chemical manufacturers could recover costs of defending tort claims related to the performance of government contracts during Vietnam War); *cf. United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (plurality opinion) (determining enforceability of contracts between government and financial institutions after regulatory changes); *Mobil Oil* v. *United States*, 530 U.S. 604 (2000) (determining whether government repudiated lease contracts and whether oil companies were entitled to restitution of fees paid for explo-

ration rights). If the government were itself a private party, there is no question that it would be held liable as an arranger in this case. No reason justifies the Ninth Circuit's departure from that approach. This Court's intervention is therefore necessary to ensure the fair and uniform application of CERCLA.

CONCLUSION

For the reasons stated, this Joint Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JEAN A. MARTIN
ATLANTIC RICHFIELD COMPANY
333 South Hope Street
Los Angeles, CA 90071
(213) 486-0761
Counsel for Petitioner Atlantic Richfield Company

CHARLES G. LAMBERT
CHEVRONTEXACO CORPORATION
2613 Camino Ramon
San Ramon, CA 94583
(925) 973-4546
Counsel for Petitioner Texaco, Inc.

CARTER G. PHILLIPS*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

KATHERINE L. ADAMS
DAVID H. BECKER
SIDLEY AUSTIN BROWN & WOOD LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
Counsel for Petitioners Atlantic Richfield Company and Texaco, Inc.

* Counsel of Record

September 25, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 00-55027.
Argued and Submitted June 4, 2001.
Filed Feb. 11, 2002.
Withdrawn June 28, 2002.
Order and Opinion Filed June 28, 2002.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

and

STATE OF CALIFORNIA, *ex rel.* CALIFORNIA DEPARTMENT OF HEALTH SERVICES; HAZARDOUS SUBSTANCE ACCOUNT AND HAZARDOUS CLEANUP FUND,
Plaintiff,

v.

SHELL OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; ATLANTIC RICHFIELD COMPANY; TEXACO, INC.; LOS COYOTES ESTATES; RAMPARTS RESEARCH & FINANCIAL Corporation,
Defendants-Appellees.

UNITED STATES OF AMERICA; STATE OF CALIFORNIA, *ex rel.* CALIFORNIA DEPARTMENT OF HEALTH SERVICES; HAZARDOUS SUBSTANCE ACCOUNT and HAZARDOUS CLEANUP FUND,
Plaintiffs-Appellees,

v.

SHELL OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; ATLANTIC RICHFIELD COMPANY; TEXACO, INC.,
Defendants-Appellants,

and

LOS COYOTES ESTATES; RAMPARTS RESEARCH & FINANCIAL CORPORATION,
Defendants.

Appeal from the United States District Court for the Central District of California; Robert J. Kelleher, District Judge, Presiding. D.C. No. CV 91- 00589-RJK.

Before: TROTT, THOMAS and W. FLETCHER, Circuit Judges.

ORDER

The opinion filed on February 11, 2002, and published at 281 F.3d 812 (9th Cir.2002), is withdrawn and replaced by the attached opinion.

With the filing of this new opinion, the panel has voted unanimously to deny the Oil Companies' petition for rehearing and petition for rehearing en banc, filed March 28, 2002. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35. The Oil Companies' petition for rehearing and petition for rehearing en banc are DENIED.

The United States' petition for rehearing, filed March 28, 2002, is also DENIED.

OPINION

WILLIAM A. FLETCHER, Circuit Judge.

We are asked to decide who must pay for cleaning up the McColl Superfund Site in Fullerton, California. The site was contaminated with hazardous waste associated with the production of aviation fuel during World War II. Defendants in this case, Shell Oil Co., Union Oil Co. of California, Atlantic 9267 Richfield Co., and Texaco, Inc.[1] (collectively, "the Oil Companies"), operated aviation fuel refineries in the Los Angeles area during the war and dumped their waste at the McColl site.

The United States and the State of California brought suit against the Oil Companies under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, to recover cleanup costs incurred at the site. The Oil Companies counterclaimed under the same statute, contending that the United States was liable for cleanup costs.

On motion for summary judgment by the United States and the State of California, the district court held that the Oil Companies were liable as "arrangers" under 42 U.S.C. § 9607(a)(3). *See United States v. Shell Oil Co.* (*Shell I*), 841 F.Supp. 962, 969-70 (C.D.Cal.1993). The district court rejected the Oil Companies' argument that they were exempt from liability on the ground that the contamination was caused by an "act of war" within the meaning of 42 U.S.C. § 9607(b)(2). *See id.* at 970-72. On later cross- motions for summary judgment by the United States and the Oil Companies, the district court held that the United States was also liable as an arranger under 42 U.S.C. § 9607(a)(3) for the

[1] Texaco is the successor in interest to defendant The Texas Company.

"non-benzol" waste dumped at the site. The United States conceded that it was an arranger for the "benzol" waste. *See United States v. Shell Oil Co.* (*Shell II*), No. 91-0589, at 14-19 (C.D.Cal. Sept. 18, 1995). The district court also held that the United States had waived its sovereign immunity to suit under 42 U.S.C. § 9620(a)(1). *Id.* at 6-9. After trial, the district court held that 100% of the cleanup costs for all the waste, including the benzol waste, should be allocated to the United States, and 0% to the Oil Companies, under 42 U.S.C. § 9613(f)(1). *See United States v. Shell Oil Co.* (*Shell III*), 13 F.Supp.2d 1018 (C.D.Cal.1998).

The United States appeals, arguing that the district erred in holding that § 9620(a)(1) waives the sovereign immunity of the United States; in holding that the United States is liable as an arranger for the non-benzol waste under § 9607(a)(3); and in allocating 100% of the cleanup costs for all the waste to the United States under § 9613(f)(1). The Oil Companies cross-appeal, arguing that the district court erred in rejecting their argument that they were exempt from liability under the "act of war" provision of § 9607(b)(2). The State of California is a cross-appellee only on the "act of war" issue.

We hold the following: (1) We affirm the holding of the district court that § 9620(a)(1) waives the sovereign immunity of the United States. (2) We reverse the holding of the district court that the United States is liable for the non-benzol waste cleanup costs as an arranger under § 9607(a)(3). Because the United States is not liable as an arranger, the question of allocation of liability for the non-benzol waste between the United States and the Oil Companies under § 9613(f)(1) is moot. (3) We affirm the holding of the district court that 100% of the cleanup costs for the benzol waste should be allocated to the United States. (4) We affirm the holding of the district court that the Oil Companies are not exempt from liability under the "act of war" provision of § 9607(b)(2).

I. Factual Background

A. Avgas Production

The parties have entered into a comprehensive stipulation of facts, upon which the following narrative is based. In the early 1930s, petroleum refiners in the United States developed new technologies for producing high-octane gasoline fuel. Until that time, the highest octane gasoline available had an octane rating of about 72-73, but by 1935 refiners possessed the ability to produce mass quantities of 100-octane fuel. The primary consumer of this fuel was the United States military, which used it in airplane engines, leading to its colloquial name "avgas." The high octane and low volatility of avgas allowed the design and use of high-compression internal combustion engines for military airplanes.

Avgas was a blend of petroleum distillates and chemical additives. Its base component was ordinary gasoline, to which the refineries added varying amounts of several additives. The most prevalent additive was a compound called "alkylate," which comprised 25-40% of the weight of avgas. The production of alkylate, as well as other additives, required the use of sulfuric acid. In the production of alkylate, through a process called "alkylation," the refineries used 98% purity sulfuric acid as a catalyst. Approximately 90% of the sulfuric acid used by the refineries during the war was devoted to this purpose. As a consequence of its use in alkylation, the purity of the acid was greatly reduced. "Spent" alkylation acid could be reprocessed, at some expense, so that its purity was once again high enough for use as an alkylation catalyst. Alternatively, spent acid either could be used in other refinery processes, or could be dumped without being reused.

When the war began, the alkylation process and the production of avgas were new technological developments. During the war, production of avgas increased more than

twelve-fold, from roughly 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945. Sulfuric acid consumption increased five- fold, from 24 million pounds per year in 1941 to 120 million pounds per year in 1944. The use of sulfuric acid in the alkylation process produced quantities of spent alkylation acid far greater than had ever been produced before.

Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II. In 1942, President Roosevelt established several agencies to oversee war-time production. Among those with authority over petroleum production were the War Production Board ("WPB") and the Petroleum Administration for War ("PAW"). The WPB established a nationwide priority ranking system to identify scarce goods, prioritize their use, and facilitate their production; it also limited the production of nonessential goods. The PAW centralized the government's petroleum-related activities. It made policy determinations regarding the construction of new facilities and allocation of raw materials, and had the authority to issue production orders to refineries. Although the WPB, PAW, and other government agencies had the authority to require production of goods at refineries owned by the Oil Companies, and even to seize refineries if necessary, in fact they relied almost exclusively on contractual agreements to ensure avgas production. In particular, the government entered into long-term contracts to purchase avgas, and offered low- cost loans to refineries to help finance the construction of avgas-producing plants.

The government sought to maximize avgas production through the Planned Blending Program. Under this program, the government assisted the refineries operated by the Oil Companies in exchanging and blending various avgas components in order to maximize production of avgas. The

government could, and sometimes did, direct that specific exchanges be made, but it usually accepted what was proposed by the refineries. The instructions issued under the Planned Blending Program were at times quite detailed. Sometimes they directed refiners to blend avgas in a way that would allow increased overall production even if that method would reduce an individual refinery's yield. The program did not exercise direct control over the production of avgas components; rather, it controlled only their exchange and blending after they had been produced.

The government reduced the financial risk to producers of avgas and its components through the Aviation Gas Reimbursement Plan ("AGRP"). This program allowed oil companies that entered into long-term avgas supply contracts to recoup costs they could not have anticipated at the time of the execution of the contracts. The AGRP directly reimbursed the refineries for any extraordinary expenditures they undertook—including those incurred under the Planned Blending Program to maintain maximum avgas production during the war.

Throughout the war, the Oil Companies designed and built their facilities, maintained private ownership of the facilities, and managed their own refinery operations. The Oil Companies affirmatively sought contracts to sell avgas to the government, and the contracts were profitable throughout the war. After the war, the Oil Companies retained ownership of the facilities they had built with the help of government loans.

B. Acid Disposal and the McColl Site

Spent alkylation acid generated in the production of avgas could be reprocessed, used in other refinery operations, or discarded as waste. Some of the Oil Companies reprocessed spent alkylation acid themselves, but at various times all of them entered into contracts to have other private entities reprocess it. The Oil Companies also used spent alkylation

acid to improve the effectiveness of other avgas additives and to purify other refinery products, including gasoline, kerosene, and lubricating oil. The use of spent alkylation acid in other refinery processes produced waste in the form of "acid sludge."

Acid sludge had an acid content significantly lower than spent alkylation acid. Because of its low purity, it was difficult to reprocess and was not useful for refinery processes. Acid sludge had been a product of refinery operations before the discovery of the alkylation process. Before the war, the technology to reprocess acid sludge had existed, and some had, in fact, been reprocessed. For reasons of cost, however, most acid sludge had been dumped or burned. During the war, acid sludge was generated in much greater quantities than ever before, and the Oil Companies dumped most of it.

During the war, there was a chronic shortage of railroad tank cars to transport spent acid for reprocessing or reuse offsite from the refineries where it was generated. On two occasions, the government refused to allocate the materials and resources necessary to build new acid reprocessing facilities in northern California. However, some reprocessing facilities were built during the war. One, owned by Stauffer Chemical Company, was capable of handling both spent alkylation acid and acid sludge, but it failed to operate at design capacity and this failure resulted in the dumping of both spent alkylation acid and acid sludge. By late 1944 and 1945, the Oil Companies were producing so much spent alkylation acid that they could not reuse all of it in their own refineries, and the facilities for reprocessing this acid were insufficient. When the resulting bottleneck threatened to halt avgas production, the Oil Companies dumped large quantities of spent alkylation acid at the McColl site.

The government was aware during the war that avgas production generated acid wastes and that increased avgas

production increased acid waste generation. The government took some actions to alleviate the problem of waste disposal. For example, in 1945, it attempted to solve the problem of the spent acid reprocessing bottleneck by facilitating the lease of a large storage tank (known as the "Wilshire Storage Tank") in Southern California. The government never specifically ordered or approved the dumping of spent acid and acid sludge by the Oil Companies, and there is no evidence that the United States was aware of the disposal contracts between the Oil Companies and McColl.

The dumping site in this case is named after Eli McColl, who contracted to accept both spent acid and acid sludge from refineries near Los Angeles.[2] McColl began accepting the waste and dumping it in earthen sumps at the site in June 1942, and continued to do so until shortly after the end of the war. According to the district court, about 12% of the waste at the McColl site was spent sulfuric acid from the alkylation process, and about 5.5% was acid sludge resulting from the treatment of government-owned benzol. *Shell III,* 13 F.Supp.2d at 1024-25. Of the remaining 82.5% of the waste, most was acid sludge resulting from the chemical treatment of non-avgas refinery products using spent alkylation acid. In the 1950s, McColl, with the assistance of the Oil Companies, filled and capped the waste sumps to allow residential development of nearby areas, even though approximately 100,000 cubic yards of hazardous waste remained at the site. The government began removing this waste from the site in the 1990s, at an eventual cost of close to $100 million. On August 27, 1998, the McColl Site was officially removed from the National Priorities List and converted into a wildlife sanctuary and community recreation facility.

---

[2] No contracts have been found between Eli McColl and the Oil Company defendants other than Shell Oil, but it has been stipulated by the parties that the McColl site contains waste from all the Oil Companies.

II. Sovereign Immunity

We first examine whether the government has waived its sovereign immunity for purposes of liability under CERCLA. Plaintiffs suing the United States must point to an "unequivocal expression" of intent to waive sovereign immunity. *See Lane v. Pena,* 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *Blue v. Widnall,* 162 F.3d 541, 544 (9th Cir.1998). A waiver of sovereign immunity must be "unambiguous[ ]," and the relevant statutory language is to be "strictly construed" in favor of the sovereign. *Lane,* 518 U.S. at 192, 116 S.Ct. 2092; *see also United States v. Williams,* 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995).

The Oil Companies contend that the necessary waiver appears in § 120(a)(1) of CERCLA, codified at 42 U.S.C. § 9620(a)(1):

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

The district court held that this provision does waive the government's immunity in the circumstances of this lawsuit. We review this question of subject matter jurisdiction de novo. *See Ma v. Reno,* 114 F.3d 128, 130 (9th Cir.1997). We agree with the district court.

The Supreme Court has read the language of § 9620(a)(1) as an unambiguous waiver of the sovereign immunity of the United States. In *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), the Court concluded

that an analogous provision of CERCLA was an unambiguous abrogation of the sovereign immunity of the states. It was led to that conclusion by comparing the language of § 9607(d)(2), applicable to the states, to the language of § 9620(a)(1), applicable to the United States:

> It can be no coincidence that in describing the potential liability of the States in [§ 9607(d)(2)], Congress chose language mirroring that of [§ 9620(a)(1)]. In choosing this mirroring language in [§ 9607(d)(2)], therefore, Congress must have intended to override the States' immunity from suit, *just as it waived the Federal Government's immunity in* [§ 9620(a)(1)].

Id. at 10, 109 S.Ct. 2273 (emphasis added). We are, of course, aware that the Court has overruled its conclusion in *Union Gas* that Congress has the power under the Commerce Clause to abrogate the sovereign immunity of the states. *See Seminole Tribe v. Fla.*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). But *Seminole Tribe* does nothing to cast doubt on the correctness of the Court's understanding of the meaning of § 9620(a)(1).

The United States does not dispute that § 9620(a)(1) waives its sovereign immunity under CERCLA for some activities. It argues, however, that the waiver contained in § 9620(a)(1) is limited to cases in which it has undertaken "nongovernmental" activities. In part, it bases its argument on the fact that the heading for § 9620 is "Federal facilities." It also bases its argument on the text of § 9620(a)(1), contending that the phrase making the government subject to CERCLA "in the same manner and to the same extent . . . as any nongovernmental entity" restricts the waiver of sovereign immunity to situations in which the government acts as a "nongovernmental entity."

We believe that the United States' construction of § 9620(a)(1) is too narrow. First, we disagree with the government's analysis of the importance of the heading

"Federal facilities" at the beginning of § 9620. Relying on this heading, the government argues that Congress intended to waive sovereign immunity only with respect to federally-owned facilities. We agree with the Third Circuit's analysis in rejecting this argument. *See FMC Corp. v. United States Dep't of Commerce,* 29 F.3d 833, 842 (3d Cir.1994) (en banc). As an initial matter, we note that nothing in the text of § 9620(a)(1) limits its effect to federal facilities. *See id.* Further, the waiver language of § 9620(a)(1) was enacted in 1980, and the "Federal facilities" portion of CERCLA was added in 1986. For organizational reasons, the post-1986 codifiers placed the already-existing waiver of immunity under the "Federal facilities" heading applicable to the newly-added 1986 provision. *Id.* Finally, after the waiver provision was moved, it employed language that explicitly referred without qualification to the liability- creating provision of CERCLA. It employed no new language that would have limited the scope of the waiver. *Id.*

Second, the United States has repeatedly been held liable under CERCLA for acts that cannot possibly be characterized as "nongovernmental." The clearest example is the United States' immense CERCLA liability for cleanups associated with military installations and activity. Private parties do not operate military bases, and yet the United States has been found liable for the cleanup of hazardous wastes at military facilities. As explained by the Third Circuit:

> [A]lthough no private party could own a military base, the government is liable for clean up of hazardous wastes at military bases because a private party would be liable if it did own a military base. *Cf. United States v. Allied Corp.,* 1990 WL 515976, at *2-*3, 1990 U.S. Dist. LEXIS 20061, at *7-*9 (N.D.Cal. Apr.25, 1990) (United States Navy found liable under CERCLA because it authorized demolition which caused release of hazardous substances).

FMC, 29 F.3d at 840.

We hold that CERCLA's waiver of sovereign immunity is coextensive with the scope of liability imposed by 42 U.S.C. § 9607. If § 9607 provides for liability, then § 9620(a)(1) waives sovereign immunity to that liability. In so holding, we align ourselves with the two circuits that have thoroughly considered the issue. *See East Bay Mun. Util. Dist. v. United States Dep't of Commerce,* 142 F.3d 479, 482 (D.C.Cir.1998) ("*East Bay MUD* ") (recognizing that the phrase "in the same manner and to the same extent ... as any nongovernmental entity" was potentially ambiguous, but holding that § 9620 does not, on its face, "suggest a distinction between the exercise of private . . . and regulatory powers"); *FMC,* 29 F.3d at 841- 42 ("[T]he relevant sovereign immunity question under CERCLA is . . . whether [the government's] activities, however characterized, are sufficient to impose liability on the government as an owner, operator, or arranger.").

The United States warns that this reading of § 9620(a)(1) will subject it to liability in a wide range of cases where it acts in either a regulatory or remedial capacity. We believe its fears are exaggerated. We recognize that by making the United States liable "in the same manner and to the same extent" as a private party, § 9620 does subject the government to significant risk of liability. But the government is subject to liability only to the extent of the substantive provisions of CERCLA. That is, the waiver of sovereign immunity is coextensive with the scope of liability under 42 U.S.C. § 9607, but the United States is liable under that section only when it qualifies as an owner or operator of a facility, an arranger of waste disposal, or an entity that accepts waste for treatment or disposal. Otherwise, it is not liable and it maintains its sovereign immunity. As we hold below, even the pervasive activity of the government in this case does not fit within these categories.

We also note two defenses provided within § 9607. First, § 9607(d)(1) confers a defense upon parties "for costs or

damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan," unless such actions are negligent. Second, § 9607(d)(2) expressly immunizes state and local governments from liability for actions "taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." *See East Bay MUD,* 142 F.3d at 483 (suggesting that § 9607(d)(1) is intended to apply to activity that is "primarily or exclusively governmental"); *FMC,* 29 F.3d at 841 ("[I]nasmuch as state and local governments are immune from CERCLA liability [because of § 9607(d)(2)] for the consequences of cleanup activities . . . this distinction [is] implied in the federal government's waiver of sovereign immunity as well.").

III. "Arranger" Liability for "Non-Benzol" Waste

We next examine whether the government is liable as an "arranger" with respect to the "non-benzol" waste at the McColl site. Section 107(a)(3) of CERCLA, codified at 42 U.S.C. § 9607(a)(3), specifies that an arranger is a "covered person" and is thus liable for cleanup costs. The text of § 9607(a)(3) provides that:

> any person who by contract, agreement, or otherwise *arranged* for disposal or treatment, or *arranged* with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . shall be liable . . . .

(Emphasis added.)

A. Direct Arranger Liability

The district court characterized "traditional" direct arranger liability cases as those in which the "sole purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes." *Shell II,* No. 91-0589 at 14. It noted that the Oil Companies had not argued for direct arranger liability on this basis, but it nonetheless held that "certain facts have been presented to the Court upon which the Court could rest a traditional finding of arranger liability. The Government began to arrange for the disposal of acid wastes, by undertaking the responsibility for disposing of the sludge . . . . The case law certainly supports the proposition that once an entity undertakes to arrange for disposal or treatment, it cannot abdicate responsibility when the disposal becomes infeasible." *Id.* at 18-19.

The district court relied on two things to support its conclusion that the United States was liable as a direct arranger. First, it relied on an August 1944 letter from the PAW concerning an acid reclamation plant proposed by the Monsanto Chemical Company that would have reprocessed acid waste produced by a Tidewater Oil Company refinery in Northern California. Monsanto had delayed building the plant because of a disagreement with the government over the amount of accelerated depreciation it would receive. A compromise was reached on the depreciation issue in March 1944, but Monsanto had allowed its priority ranking, which would have authorized the construction of the plant, to expire. Then, in July 1944, the WPB refused to renew the priority ranking.

The PAW made estimates of the amount of fresh acid that would be required in Northern California, and was aware of acid waste disposal problems that the Tidewater refinery was having, but it declined to get involved in resolving them. According to the stipulated facts, "[t]he PAW responded to Tidewater that it considered Tidewater's disposal problems

when making its acid estimates to WPB. On July 8, 1944, the PAW said that the acid disposal problem was being left to WPB since 'they have overall responsibility for industrial uses of acid.' . . . In a letter dated August 23, 1944, from the PAW to Tidewater, the PAW again stated 'the sludge disposal problem was being left with the WPB since they have the over-all responsibility for industrial uses of acid.' "

Second, the district court states that the "Government even undertook the rental of a storage tank, known as the Wilshire Storage Tank, for the disposal of some acid wastes." *Id.* at 18. The stipulated facts indicate that in March 1945 the government did make efforts to facilitate the lease of a storage tank for acid waste in Southern California owned by the Wilshire Oil Company, with the result that the tank was being used for that purpose by April 1945. The stipulated facts indicate that the government initially gave some consideration to leasing the tank itself, but do not indicate that the government was, in the end, the lessee of the tank.

The Oil Companies do not argue to us, just as they did not argue to the district court, that these facts are sufficient to support a finding that the United States was liable as a "traditional" direct arranger. A direct arranger must have direct involvement in arrangements for the disposal of waste. *See, e.g., Cadillac Fairview/Cal., Inc. v. United States,* 41 F.3d 562 (9th Cir.1994) (in which rubber companies that had transferred contaminated styrene to Dow Chemical for reprocessing were held to be arrangers); *Catellus Devel. Corp. v. United States,* 34 F.3d 748 (9th Cir.1994) (in which an automotive parts company that had sent used car batteries to a battery-cracking plant for lead recovery and disposal was held to be an arranger). We understand why the Oil Companies did not argue, and are not arguing, for arranger liability on this basis. There are simply insufficient facts in the record to support a conclusion that the United States

directly entered into arrangements to dispose of acid waste at the McColl site.

B. Broader Arranger Liability

The Oil Companies argue for arranger liability on a broader theory, contending that the government had sufficient control over the process that created the waste such that it should be considered an arranger. The test they propose is that if a party "has substantial control over a manufacturing process wherein a hazardous waste stream is generated and disposed of, then that party assumes the obligation to control the disposal of that waste stream." The district court applied a somewhat different test to find arranger liability on a broader theory. It took its test from its reading of a case decided by the Eighth Circuit, *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir.1989). That test, like the Oil Companies' proposed test, includes a focus on the control by the United States: "[A] party is . . . an arranger (1) if it supplies raw materials to be used in making a finished product, (2) and it retains ownership or control of the work in progress, (3) where the generation of hazardous substances is inherent in the production process." *Shell II,* No. 91 0589 at 15. We agree with the Oil Companies and the district court that control is a crucial element of the determination of whether a party is an arranger under § 9607(a)(3). But we disagree with their conclusion that the government exercised the requisite control on the facts of this case.

There is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability under § 9607(a)(3). Rather, we are required to sort through the fact patterns of the decided cases in order to find similarities and dissimilarities to the fact pattern of our case. In finding that the United States was an arranger, the district court explicitly relied on *Aceto.* The question in *Aceto* was whether pesticide manufacturers were arrangers and therefore liable for

cleanup costs for contamination at the plant of a pesticide "formulator," Aidex Corporation. The pesticide manufacturers routinely shipped active pesticide ingredients to Aidex, which blended them with inert ingredients in order to produce commercial-grade pesticides that could be sold on the open market. After the commercial-grade pesticides were formulated, Aidex shipped them either back to the manufacturers or directly to customers of the manufacturers. The manufacturers owned the pesticide ingredients and the commercial-grade pesticides at all times. The generation of waste at the Aidex plant was an "inherent" part of the formulation process, through such things as spills, cleaning of equipment, and mixing and grinding operations. The Eighth Circuit held, under these circumstances, that the pesticide manufacturers were arrangers: "Aidex is performing a process on products owned by defendants for defendants' benefit and at their direction; waste is generated and disposed of contemporaneously with the process." *Id.* at 1381.

We disagree with the district court that *Aceto* controls this case, for the United States was in a materially different position in this case from the pesticide manufacturers in that case. The United States was the end purchaser of avgas, and was thus more like a customer of the pesticide manufacturers than like the manufacturers themselves. Further, unlike the pesticide manufacturers, the United States never owned any of the raw materials or intervening products. It never owned unrefined petroleum, refined gasoline, fresh sulfuric acid, spent acid, or alkylate or any other additive. Finally, unlike the manufacturers, the United States did not contract out a crucial and waste-producing intermediate step in a manufacturing process, and then seek to disclaim responsibility for the waste generated during that step.

The Oil Companies also rely on an earlier Eighth Circuit case, *United States v. Northeastern Pharmaceutical & Chemical Co.*, ("*NEPACCO* "), 810 F.2d 726 (8th Cir.1986).

NEPACCO manufactured disinfectant at one of its plants. Edwin Michaels was the president and a principal shareholder of NEPACCO, and John W. Lee was a vice-president and plant supervisor. With the knowledge and permission of Lee, the plant manager agreed with a third party to bury drums of chemical waste from the plant on a farm several miles away from the plant. Both Lee and Michaels were sued for cleanup costs as arrangers under § 9607(a)(3). By the time of the suit, NEPACCO was insolvent.

The Eighth Circuit held that Lee was an arranger, even though he did not personally own or possess the waste:

> It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme . . . . Lee, as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances at the Denney farm site. We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under . . . § 9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA.

Id. at 743. It also held that Michaels was an arranger, even though he was not as directly involved as Lee:

> Unlike Lee, Michaels was not personally involved in the actual decision to transport and dispose of the hazardous substances. As NEPACCO's corporate president and as a major NEPACCO shareholder, however, Michaels was the individual in charge of and directly responsible for all of NEPACCO's operations, including those at the Verona plant, and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances.

Id. at 745. In *Aceto,* the Eighth Circuit explained its earlier holding in *NEPACCO,* stating in dictum that it had held in that case that arranger liability is appropriate for "those who had the authority to control the disposal, even without ownership or possession." *Aceto,* 872 F.2d at 1382.

The Oil Companies rely on *NEPACCO,* and its later characterization in *Aceto,* for the proposition that neither ownership nor actual control is necessary for arranger liability under § 9607(a)(3). In the view of the Oil Companies, mere "authority to control" is sufficient. The United States did not exercise any actual control over the Oil Companies' disposal of spent acid and acid sludge at the McColl site; indeed, it did not even know that the Oil Companies had contracts to dispose of their waste at the site. But the United States had ultimate authority to exercise such control. It *could* have exercised control over the disposal of the waste, just as it could have seized the Oil Companies' refineries under eminent domain and operated those refineries itself. If authority to control the Oil Companies' waste disposal were sufficient without more, as the Oil Companies contend, then we would agree that the United States was an arranger under § 9607(a)(3).

However, we believe that the Oil Companies' conception of "authority to control" is based on an incorrect reading of *NEPACCO.* In *NEPACCO,* there was actual control exercised by vice-president Lee, who gave permission to the plant supervisor to dispose of the waste at the farm. Michaels was Lee's superior in the chain of command. Not only did Michaels have authority to control Lee's actions, but there had also been an actual exercise of control by Lee. In other words, *NEPACCO* holds that responsible officials in the chain of command of a corporation may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the

corporation, and the other officer has the authority to control the first officer.

In this case, the United States neither exercised actual control, nor had the direct ability to control, in the sense intended in *NEPACCO.* In this case, the waste never belonged to the United States, so there was never a United States employee in a position comparable to Lee's. Further, even if we put the problem of ownership of the waste to one side, Lee exercised actual control over the disposal of waste. In this case, no official or employee of the United States ever exercised actual control over any of the waste disposal at issue. Thus, *NEPACCO's* premise for liability of a superior with authority to control never existed.

Moreover, an analogy to *NEPACCO* misses the essence of that case: The court in *NEPACCO* held officers of a bankrupt company liable for an actual misdeed of that corporation. One of the two officers had participated in the misdeed; the other officer was the president and a principal shareholder of the corporation, who as president had the authority to control the other officer and as shareholder had the potential to realize substantial financial benefit from the misdeed. In this case, there is no bankrupt corporation; the United States committed no misdeed; and there is no officer or employee named as a defendant.

To summarize our view of *Aceto* and *NEPACCO,* and to assess the interrelationship of the factors of ownership, possession, and control over waste disposal, we can do no better than to quote from Judge Levi's careful opinion in *United States v. Iron Mountain Mines, Inc.,* 881 F.Supp. 1432 (E.D.Cal.1995). He writes:

> It is true that some cases impose arranger liability on parties who did not literally own or physically possess hazardous waste at the time it was disposed of or released. But in each of these cases the party either was

> the source of the pollution or managed its disposal by the arranger [citing numerous cases, including *Aceto* and *NEPACCO*].
>
> No court has imposed arranger liability on a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue. *See, e.g., General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir.1992) ("it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision") (emphasis in original).

Id. at 1451.

There are two circuit cases more closely on point than *Aceto* and *NEPACCO,* both of which deal with arranger liability of the United States for its activities in wartime. The first is *FMC Corp. v. United States Dep't of Commerce,* 29 F.3d 833 (3d Cir.1994) (en banc). In *FMC,* suit was brought against the United States under CERCLA to recover cleanup costs at a plant that had been used to manufacture high tenacity rayon during World War II. The government had vigorously sought to increase production of such rayon during the war, and it considered facilities producing it to be "'war plants' subject to its maximum control." *Id.* at 836. The United States installed government-owned rayon-manufacturing equipment, which it leased to the plant owner. To ensure an adequate supply of sulfuric acid for the plant, the government built and retained ownership of a new acid plant adjacent to the rayon-manufacturing plant, and the two plants were connected by a pipeline. The government obtained draft deferments for workers at the plant, directly controlled the process by which the rayon was manufactured, directly controlled the supply and price of the raw materials, and directly controlled the price of the rayon produced.

The Third Circuit, sitting en banc, held in *FMC* that the United States was liable under CERCLA as an "operator" of the facility under § 9607(a)(1). But it divided evenly on the question of whether the United States was an "arranger" under § 9607(a)(3). Because it divided evenly, it wrote no opinion on the arranger question; but we may, despite the lack of opinion, derive something from the case. If it was a close question on the facts of *FMC* whether the United States was an arranger, it cannot possibly be a close question on the facts in the case before us. The degree of the United States' actual control over the manufacture of rayon in *FMC*, and its actual control over the resulting production of waste, was substantially greater than in this case. Yet, even on those facts, a majority of the court was not willing to hold that the United States was an arranger.

The second case is *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir.1995). The issue was whether the United States was liable as an arranger for cleanup costs at a plant that had manufactured Agent Orange during the Viet Nam War. The plant had been devoted exclusively to the production of Agent Orange, pursuant to "rated contracts" with the United States directing that the manufacturing of Agent Orange take precedence over all other manufacturing. The United States did not own any of the components of Agent Orange, but it did issue directives to a third-party chemical company to ensure a sufficient supply of an essential raw material. The contracts required the manufacturer to maintain certain health and safety standards, and United States inspectors visited the plant on two occasions. "The United States knew or should have known that the production of Agent Orange produced wastes," *id.* at 807, but the manufacturer disposed of the waste by burial without the knowledge or consultation of the United States. The manufacturer profited from its sales of Agent Orange to

the United States, and after the war continued to make related chemical products that it sold commercially.

The Eighth Circuit held in *Vertac* that the United States was not an arranger under § 9607(a)(3). The facts in *Vertac* are similar to the facts in this case. In both cases, products were manufactured for purchase by the United States in wartime; in both cases, the manufacturing was carried out under government contracts and pursuant to government programs that gave it priority over other manufacturing; in both cases, the companies voluntarily entered into the contracts and profited from the sale; and in both cases, the United States was aware that waste was being produced, but did not direct the manner in which the companies disposed of it. The involvement of the United States in the manufacturing of avgas was somewhat greater than its involvement in the manufacturing of Agent Orange, but we believe that this was a matter of degree rather than kind.

C. Conclusion

Based on a comparison of the facts in this case to those in *Aceto, NEPACCO, FMC,* and *Vertac,* we hold that the United States was not an arranger under § 9607(a)(3) with respect to non-benzol waste, even under a broad theory of arranger liability. Because the United States is not an arranger, it has no liability under CERCLA for the cleanup costs. The United States has appealed the district court's allocation of liability between itself and the Oil Companies for cleanup of the non-benzol waste. However, because of our holding that the United States is not an arranger, that portion of the United States' appeal is moot.

IV. Liability for Benzol Waste

At one point in the litigation, the district court believed that the United States had conceded liability for 100% of the cleanup cost of waste resulting from the production of

government-owned benzol. *See Shell III,* 13 F.Supp.2d at 1024 ("[O]ne of the few points of agreement is that the Government is wholly responsible for acid waste resulting from acid treating in the production of benzol."). The United States contended, however, that while it had agreed that it was an arranger with respect to the benzol waste, it had not agreed that it should be allocated 100% of the cleanup cost for that waste.

In response to the United States' contention, the district court wrote in a later unpublished order, "Even assuming that the Government did not concede any liability for benzol waste, the Court still allocates 100 percent of the cost of cleanup of benzol waste to the Government." The United States appeals from this allocation. On the assumption made by the district court that the United States did not concede liability, the question before us is whether the district court erred in allocating 100% of the cleanup costs to the United States.

CERCLA provides that the district court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). We review the district court's allocation of cleanup costs among liable parties for abuse of discretion and for clear error. As we said in *Boeing Co. v. Cascade Corp.,* 207 F.3d 1177 (9th Cir.2000), "This language[of CERCLA] gives district courts discretion to decide what factors ought to be considered, as well as the duty to allocate costs according to those factors. We reverse only for an abuse of the discretion to select factors, or for clear error in the allocation according to those factors." *Id.* at 1187.

The district court conducted a full-scale trial with respect to allocation of cleanup costs at the McColl site. The United States introduced a substantial amount of evidence with respect to the acid waste generally, but almost no evidence directed specifically to the benzol waste. At the conclusion of

the trial, the district court allocated 100% of the costs for the non-benzol waste to the United States. In a thorough opinion, the district court relied on several factors to support its conclusion. *See Shell III,* 13 F.Supp.2d at 1026-28. First, the cleanup costs are properly seen as part of the war effort for which the American public as a whole should pay. Second, the United States generally refused to make tank cars available to the Oil Companies to transport the waste to Northern California for reprocessing. Finally, the United States refused to allocate resources to build reprocessing plants. In the end, the district court concluded:

> The benefits of avgas to the war effort were such that the United States was willing to incur almost any cost to obtain the maximum quantity and quality of avgas . . . . Despite the size of the response costs, the Court is confident that, had the future CERCLA regime been foreseen by the parties, the Government would have agreed to pay for the costs of the cleanup of the McColl Site (or any other unforeseen cost) in the blink of an eye[.]

Id. at 1030.

In its later unpublished order, the district court concluded that 100% of the cleanup costs for the benzol waste should also be allocated to the United States, for the reasons given in *Shell III* with respect to the non-benzol waste. It wrote, "Responsibility for the [benzol] waste is fully allocable to the Government for the same reasons that avgas sludge is fully allocable to the Government." We hold that the district court did not abuse its discretion in choosing the factors on which to rely in determining allocation, nor did it clearly err in applying those factors to the benzol waste.

We recognize that the district court's analysis in *Shell III* was focused on the non-benzol rather than the benzol waste. The reason for this focus, however, was that the United States

had introduced very little evidence with respect to the benzol waste—so little, in fact, that the district court was under the impression that the United States had conceded complete liability with respect to those costs. When the United States objected to the district court's conclusion that it had conceded liability, the court explicitly extended its *Shell III* analysis to the benzol waste. We believe that it was entirely justified in so doing. Indeed, to the degree that the equitable factors support allocation of the cleanup costs to the United States with respect to the non-benzol waste, where the arranger status of the United States was disputed, such factors are even stronger with respect to the benzol waste, where the United States concedes that it was an arranger. We therefore affirm the district court's allocation of 100% of the cleanup costs for the benzol waste to the United States.

V. Act of War

Finally, we examine whether the Oil Companies enjoy a defense to liability because the government's activities in regulating wartime petroleum production constituted an "act of war" under § 107 of CERCLA, codified at 42 U.S.C. § 9607(b)(2). That section provides:

> There shall be no liability under [CERCLA] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . an act of war[.]

The parties and the district court have recognized that there is very little authority to guide our interpretation of this provision. *See Shell I,* 841 F.Supp. at 970. CERCLA does not define the term "act of war," and we have found no case law exploring the extent of the defense.

We agree with the district court that the "act of war" defense is not available to the Oil Companies. Our analysis here recapitulates the district court's careful examination of the issue. *See Shell I,* 841 F.Supp. at 970-72. The district court first noted that CERCLA uses expansive language to impose liability, but uses circumscribed and narrow language to confer defenses. *Compare, e.g.,* 42 U.S.C. § 9607(a) *with id.* § 9607(b). The district court then recognized that although the legislative history of CERCLA, and of its amendment in the Superfund Amendments and Reauthorization Act of 1986, did not explain the nature of the "act of war" defense, it did emphasize that CERCLA was to be a strict liability statute with narrowly construed exceptions.

The district court noted that the term "act of war" appears to have been borrowed from international law, where it is defined as a "use of force or other action by one state against another" which "[t]he state acted against recognizes ... as an act of war, either by use of retaliatory force or a declaration of war." *Shell I,* 841 F.Supp. at 972 (citing James R. Fox, *Dictionary of International and Comparative Law* 6 (1992)). The two treatises that discuss the issue suggest that "act of war" has a narrow meaning. One suggests the "act of war" defense requires "massive violence." *See* 4 William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 8.13(C)(3)(c), at 697 (1992). The other suggests that it requires "natural or man-made catastrophes beyond the control of any responsible party." *See* 3 The Law of Hazardous Waste § 14.01[8][b], at 14-162.2 (Susan M. Cooke, ed., 2001). Case law in other contexts also suggests a narrow definition of "act of war." For example, in *Farbwerke Vormals Meister Lucius & Bruning v. Chem. Found.,* 283 U.S. 152, 51 S.Ct. 403, 75 L.Ed. 919 (1931), the Supreme Court characterized, in dictum, the United States' wartime seizure and assignment of patents owned by German companies as "act[s] of war." *Id.* at 161, 51 S.Ct. 403.

In doing so, the Court distinguished the unilateral acts of the United States from acts of mutually contracting parties. Other cases endorse this distinction. *See also Ribas y Hijo v. United States,* 194 U.S. 315, 322, 24 S.Ct. 727, 48 L.Ed. 994 (1904) (seizure of enemy vessel was an "act of war" because "[t]here is no element of contract"); *United States v. Winchester & Potomac R.R. Co.,* 163 U.S. 244, 256-57, 31 Ct.Cl. 450, 16 S.Ct. 993, 41 L.Ed. 145 (1896) (seizure of Confederate railroad materials was an "act of war" because it "had no element of contract, but was wholly military in character").

The Oil Companies do not discuss or otherwise respond to this authority. Rather, they argue that it is impossible to distinguish between acts of combat and acts taken pursuant to government direction. They contend that an "act of war" includes any action by the federal government under the authority of Article I, § 8, clause 11 of the Constitution, which grants Congress the power "[t]o declare war." But the argument that any governmental act taken by authority of the War Powers Clause is an "act of war" sweeps too broadly. To take but one example, we have been unable to discover any case in which wartime price controls have been held to be "acts of war."

Finally, even if we were to accept the Oil Companies' position, that the involvement of the United States on wartime production of avgas was an "act of war" within the meaning of § 9607(b)(2), they cannot show that the actions they took to dispose of avgas-related waste were caused "solely" by an act of war, as required by that section. The undisputed facts indicate that the Oil Companies had other disposal options for their acid waste, that they dumped acid waste from operations other than avgas production at the McColl site, and that they were not compelled by the government to dump waste in any particular manner.

VI. Conclusion

We AFFIRM the holding of the district court that § 9620(a)(1) waives the sovereign immunity of the United States under CERCLA. We REVERSE the holding of the district court that the United States is liable as an arranger under § 9607(a)(3). This holding renders moot the United States' appeal of the district court's allocation of liability between the United States and the Oil Companies as to the non-benzol waste. We AFFIRM the holding of the district court that 100% of the cleanup costs for the benzol waste should be allocated to the United States. We AFFIRM the holding of the district court that the Oil Companies do not have a valid defense to liability under the "act of war" provision of § 9607(b)(2).

AFFIRMED in part and REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Sep. 18, 1995]

CV 91-0589-RJK

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

SHELL OIL COMPANY, *et al.*
Defendants,

AND RELATED ACTIONS

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

On July 31, 1995, at 10:00 a.m., the Honorable Robert J. Kelleher presiding, the following motions came on for hearing: (1) United States' Motion for Partial Summary Judgment Based on Sovereign Immunity; (2) Oil Companies' Motion for Partial Summary Judgment Against the United States for Liability Under CERCLA Section 107(a)(3); (3) United States' Cross-Motion for Partial Summary Judgment on CERCLA Counterclaims; (4) United States' Motion for Partial Summary Judgment on the Pleadings with Respect to the Contract Counterclaims; (5) United States' Motion to Strike Those Portions of Defendants' Brief Relating to Benzol or Toluene, or in the Alternative, to Stay Consideration of These Issues Pending Discovery; (6) Oil Companies' Motion to Strike the Martin Melosi Declaration; and (7) United States' Motion to Exclude the Wimer and Grant Declarations.

Based on the pleadings submitted in support of and in opposition to the above motions and argument made at hearing, the Court determines as follows:

II. PROCEDURAL BACKGROUND

The United States of America ("Plaintiffs") seeks, by this action, to recover costs incurred, and to obtain declaratory relief as to liability for costs yet to be incurred, in responding to the presence of hazardous wastes at a site in Fullerton, California, known as the McColl Site ("the Site"). Recovery of response costs is sought pursuant to section 107(a) of the Comprehensive, Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub.L. No. 96-510, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. 99-499, codified at 42 U.S.C. § 9607(a).

This Court has previously granted summary judgment as to the liability of the Oil Companies (Shell Oil Company, Union Oil Company, Atlantic Richfield Company, and Texaco, Inc., herein referred to as "Shell," "Union," "ARCO," and "Texaco," respectively and "Oil Companies," collectively) under section 107(a) of CERCLA, 42 U.S.C. § 9607(a) against the Oil Companies. *See* 841 F. Supp. 962, 975 (C.D. Cal. 1993). The Oil Companies counterclaimed against the United States (the "Government"), asserting that the Government is liable under section 107 of CERCLA due to its own conduct, including the control it exercised over the petroleum industry during World War II. These counterclaims are the subject of motions now before the Court.

The Government moves for summary judgment, asserting that its sovereign immunity insulates it from CERCLA liability with respect to the McColl site. The Oil Companies oppose the motion and move for summary judgment as to the Government's liability as an "arranger" under CERCLA. The

United States brings a cross-motion for summary judgment on the same subject.

This Memorandum of Decision and Order is based on the Joint Statement of Undisputed Facts and by all other pleadings and documents submitted in support of these motions. The Court disregards the declarations of Elizabeth Grant and Warren Wimer.

III. FACTUAL BACKGROUND

During World War II, the federal government instituted a regulatory regime under which many industries cooperated with the government in providing the necessary armaments and supplies to support the United States' fighting forces. Not unlike other industrial sectors, the petroleum industry was subject to pervasive oversight and intermingling by agencies of the federal government. Such extensive oversight resulted from the federal government's wartime requirement for high octane. High octane, or 100 octane aviation gasoline ("avgas") was an oil weapon during World War II, one which allowed allied fighters to attain higher speeds, higher ceilings, faster rates of climb and the ability to carry a heavier load than our enemies could achieve.

The Oil Companies contend that the regulatory controls over their wartime operations had the legal and practical effect of coercing their production of avgas. The Government contends that the oil industry voluntarily undertook the production, viewing avgas as a commercial product with a huge potential market. The undisputed evidence discloses that the government pervasively regulated the petroleum industry during World War II, as well as the modes of available transportation within the country, including railroad tank cars. The undisputed evidence also discloses that the Government regulated the petroleum industry extensively and engaged in private-like conduct, such as contracting for the purchase of and purchasing avgas. It is undisputed that the Government

purchased the avgas solely as a result of and for the advancement of the war effort.

During the war, the Government's need for avgas grew exponentially. The Government entered into contracts with the Oil Companies for avgas production. In addition, various executive agencies sprung up during the war as a result of executive orders, presidential letters, and legislation. These wartime agencies, boards and commissions interacted heavily with the petroleum industry.

The War Production Board ("WPB") set policy for and issued mandatory regulations for the acquisition and prioritization of scarce materials. The Petroleum Administration of War ("PAW") similarly instituted a blending program by which it required quarterly inventory reports from all refineries, authorized purchase of certain quantities of raw materials, and instructed refineries with respect to manufacturing specifications. The PAW had approval power over prices of components, such as cumene, acid and isopentane, which the Oil Companies needed for the production of avgas. The Defense Supplies Corporation ("DSC") was designated as the sole purchaser of aviation gasoline during the war. The Government also controlled the available modes of transportation for the raw and finished materials.

As a result of the regulatory regime instituted by the Government, avgas was produced in great quantities for the war effort. Two byproducts, acid sludge and alkylation acid, necessarily resulted from the production of avgas. Spent alkylation acid could and was, in part, reused, reprocessed, and put to further uses. The acid sludge, by contrast, could not be put to further use within the refineries. No further use was ever put to that resultant sludge. This Court has previously determined that acid wastes, resultant from the production of avgas, are present at the subject Site.

The Site is on land which, prior to World War II, was owned by Helen Grant. Helen Grant sold her land to one Eli McColl for $2,500 plus five cents for every barrel of sludge dumped in excess of 50,000 barrels. Subsequently, the Oil Companies used the Site as a disposal site for acid sludge and for spent alkylation acid which was not reused. This Court has already determined that the Oil Companies are liable as arrangers under CERCLA as a result of their activities generating the hazardous waste dumped at the McColl site and as a result of contracting with Eli McColl to transport the waste to, and dump it in the sumps on, the McColl site. The Oil Companies contend that the Government should share liability under CERCLA based on the Government's "arranger liability" under CERCLA.

IV. SOVEREIGN IMMUNITY

The Government's preliminary argument is that the United States did not waive its sovereign immunity under CERCLA for claims arising from its wartime regulatory activities. This argument stems from the well-established principle that the federal government is immune from suit "save as it consents to be sued." *United States v. Testan*, 424 U.S. 392 (1976). The federal government's sovereign immunity can be waived only by a clear, unequivocal statement by Congress. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). Moreover, "the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] beyond what the language requires . . . ." *Id.*

A. CERCLA's Statutory Waiver

Congress included two sections within CERCLA which operate to waive the immunity of the United States. The first section defines "persons" who may be sued under the Act. 42

U.S.C. § 9601(21). It identifies the United States as one such "person." The second section is a statutory waiver of sovereign immunity:

> Each department, agency and instrumentality of the United States (including the executive, legislative and judicial branches of government) shall be subject to, and comply with this chapter *in the same manner and to the same extent*, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1) (emphasis added).

The parties dispute the meaning of the statutory waiver set forth in section 9620. The Oil Companies argue that the waiver is unqualified, and therefore, the Government is subject to the CERCLA liability, even for regulatory actions. The Government argues that the waiver only applies to proprietary actions, where the Government acts as a market participant, emulating the conduct of private parties. The Government argues that immunity is held intact for any regulatory actions, including those undertaken as a result of fighting the war.

B. The Proprietary/Regulatory Distinction

The proprietary/regulatory distinction has its greatest application in cases involving interpretation of the Commerce Clause. For instance, in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976), the United States Supreme Court held that a state is not precluded by the dormant Commerce Clause from acting, instead of regulating to control or restrict interstate commerce, it discriminates against interstate commerce through its proprietary participation in the market. *Id.* at 809-10. The proprietary/regulatory distinction drawn in *Alexandria Scrap* is based on federalism concepts, as are the other cases cited by the

Government. *See e.g., Building & Trades Council, v. Associated Builders & Contractors, Inc.*, 113 S. Ct. 1190 (1993) (holding distinction allows states to act as market participants). While these cases aptly illustrate the proprietary/ regulatory distinction, they are wholly inapplicable to the instant case because they do not involve the relevant question of whether a general statutory waiver of the United States' liability should be construed to apply only to the Government's proprietary activities.

In *Indian Towing Co. v. United States*, 350 U.S. 51 (1955), the United States Supreme Court interpreted a general statutory waiver provision contained in the Federal Tort Claims Act. The provision, somewhat similar to the one contained in CERCLA, stated:

> The United States shall be liable . . . *in the same manner and to the same extent* as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Federal Tort Claims Act, 28 U.S.C. § 2674 ("FTCA"); *see Indian Towing*, 350 U.S. at 124.

In *Indian Towing*, a towing company sued the United States for its negligent operation of a lighthouse which resulted in the grounding of and damage to a barge. *Id.* at 123. The Government sought immunity, asserting that the FTCA's provision did not waive immunity. The Supreme Court applied the statutory waiver, observing (1) it was hard to think of any operational governmental activity which could not conceivably be privately performed; (2) all governmental activity is inescapably uniquely governmental because it is performed by the government; and (3) the FTCA did not suggest that Congress intended to draw such a fine distinction when it enacted its waiver of sovereign immunity. *Id.* at 126. Similarly, in the instant case, the conduct of engaging in a war is uniquely governmental. However, when Congress

enacted CERCLA and included a general statutory waiver within the Act, it drew no distinction as between regulatory and proprietary actions.

The Supreme Court further observed in *Indian Towing, supra*, that the FTCA contained a limitation on the waiver for "discretionary functions." *Id.* at 126 (citing FTCA, 42 U.S.C. § 2680). Consequently, under the FTCA the functions of the government at the policy level rather than at the operational level are entitled to immunity. *Wright v. United States*, 719 F.2d 1032 (9th Cir. 1983). Such a limited waiver serves to protect policy makers from judicial second-guessing. *See Baum v. United States*, 765 F. Supp. 268 (D. Md. 1991). By contrast, CERCLA contains no such provision limiting the waiver of sovereign immunity.

C. Immunity For Remedial Actions Under CERCLA

The Government's statement to the effect that the overwhelming majority of courts recognize that CERCLA's sovereign immunity waiver excludes regulatory conduct is overly broad. The overwhelming majority of courts do hold accountable state, local and the federal government when they are acting in a *remedial capacity* to respond to a release or to a threatened release of hazardous substances. The question of whether the Government is entitled to immunity for *any and all regulatory actions* has been left, for the most part, unaddressed. *See, e.g. United States v. American Color & Chem. Corp.*, 858 F. Supp. 445 (M.D. Pa. 1994); *United States v. Atlas Minerals & Chems., Inc*, 797 F. Supp. 411 (E.D. Pa.); *United States v. Skipper*, 781 F. Supp. 1106 (E.D.N.C. 1991) ; *United States. v. Azrael*, 765 F. Supp. 1239 (D. Md. 1991); *United States v. Western Processing Co.*, 761 F. Supp. 725 (W.D. Wash. 1991). Rather, they hold either that (1) pursuant to the express language of section 107(d)(2), state and local governments are expressly immune from liability for cleanup activities; or (2) that the federal

government enjoys like immunity for remedial or cleanup activities. Two recent cases do appear to address whether the federal government enjoys immunity under CERCLA for non-remedial regulatory activities.

D. The Third Circuit's Decision in *FMC v. U.S. Dept. of Commerce*

The facts underlying *FMC* are strikingly similar to those involved in the instant action. Pursuant to CERCLA, the United States sought to recover response costs from FMC for cleaning up hazardous waste created during World War II at a rayon manufacturing facility. *FMC Corp*, 29 F.3d 833, 834 (3rd Cir. 1994) (noting high demand of rayon due to rubber shortage). FMC counterclaimed, seeking contribution from the United States, claiming that it too was liable under CERCLA as a result of the pervasive control exercised over the facility during World War II. *Id.* at 834. The Government asserted that it was entitled to sovereign immunity, arguing that it could not be held liable under CERCLA for its wartime regulatory activity. *Id.* at 839-40.

After an extensive statutory analysis, the Court held that the statutory waiver did not shield the United States from liability for the actions it took during World War II with respect to the FMC site, and that both the government's regulatory and non-regulatory activities should be considered in determining whether the United States was liable as an operator or arranger under CERCLA. *Id.* at 842.

The Third Circuit considered the express statutory waiver, 42 U.S.C. § 9620(a)(1), and cases upholding the Government's immunity for cleanup actions, *Paoli R. Yard PCB Litig.*, 790 F. Supp. 94, 95-95 (E.D.Pa.), *aff'd*, 980 F.2d 724 (3d Cir. 1992). The court concluded that "the government can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility or an arranger of the disposal of hazardous wastes even though no

private party could engage in the regulatory activity at issue." *Id.* at 840; *see also Indian Towing Co. v. United States*, 350 U.S. 67, 70 (1955) (holding federal government liable for negligent operation of lighthouse although private entities forbidden from operating lighthouses). Further, the *FMC* court reasoned that given CERCLA's "essential purpose of making those responsible for problems caused by disposal . . . bear the costs . . . ," that the bottom result "simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy underlying CERCLA." *Id.* at 840, 846.[1]

E. This Court's Decision in *Lincoln v. Republic Ecology*

This Court resolved a related issue in *Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633 (C.D. 1991) (Kelleher, J.). In *Republic Ecology*, several parties were sued under CERCLA for response costs incurred in connection with the remediation of hazardous substances at an auto salvage yard within the Pasadena city limits. *Id.* A cross-complaint against the City of Pasadena sought contribution on the grounds that

---

[1] The Government encourages this Court to look to the dissent in *FMC* for guidance. Chief Judge Sloviter would have construed the waiver more narrowly to apply only to government conduct that a private party could engage in, such as ownership of property, operation of facilities. *Id.* at 846-47. Engaging in and coordinating war, Judge Sloviter posited, is a regulatory activity exclusively reserved to the federal government for which liability should not attach. She ultimately concluded that while Congress could do so, it was difficult to imagine that it intended to impose massive liability on the United States for the environmental consequences of wartime regulation, without some reference in the legislative history to its intent to do so. *Id.* at 851; *cf. Indian Towing Co. v. United States,* 350 U.S. 61, 69, 76 S. Ct. 122, 126 (1955) (stating "when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction"). This Court considers the dissent, but rejects its reasoning, given the plain language of the statutory waiver and given Congress' opportunity to have amended CERCLA since the Third Circuit's decision in *FMC*.

the City's actions in removing abandoned vehicles constituted arranging within the meaning of CERCLA. *Id.* The City moved for summary judgment on the grounds of sovereign immunity, *id.* at 634, noting that its removal of abandoned vehicles resulted from regulatory action, namely, a municipal ordinance authorizing the removal of abandoned vehicles. *Id.*

This Court held that the City of Pasadena was entitled to immunity for its actions in removing abandoned vehicles because (1) state and local governments enjoy certain special exemptions from liability; (2) CERCLA's section 9601(20)(D) specifically provided immunity for "a unit or State of local government which acquired ownership or control involuntarily through abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign." *Id.* at 636. The court reasoned that "strict liability under CERCLA should not attach to government entities engaged in legitimate sovereign, as opposed to proprietary or commercial functions." *Id.* at 637-38.

Republic Ecology includes general language indicating that local government ought not be held liable under CERCLA for regulatory actions. However, this language as well as that found in other cases cited by the Government are merely dicta as they relate to the case presently before the Court, because, with the exception of *Republic Ecology*, they all involved the question of immunity as applied to the governments' remedial or clean up activities. And in *Republic Ecology*, this Court focused on specific statutory language which provided immunity for state and local government when involuntarily acquiring title over abandoned property.

F. Conclusion on Sovereign Immunity

Congress expressly and unequivocally waived the immunity of the United States when it enacted CERCLA. There is no basis within the Act, within its legislative history, or within the law of this circuit which supports the adoption

of the proprietary/sovereign distinction in the CERCLA context. Accordingly, this Court determines, as a matter of law, that the Government is subject to the provisions of CERCLA even while it is engaged in regulatory activity, so long as such regulatory activity was nonremedial in nature.

V. ARRANGER LIABILITY UNDER CERCLA

The Oil Companies and the Government each move for summary judgment on the issue of the Government's liability as an arranger under CERCLA.

A. Standard for Imposing Arranger Liability

CERCLA section 107(a)(3) extends liability to "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party . . . ." 42 U.S.C. § 9607(a)(3)." The Court must "construe [CERCLA' s] provisions liberally to avoid the frustration of the beneficial legislated purposes," *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 804 (9th Cir. 1989), and to accomplish its remedial goals. *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F. 2d 1355, 1363 (9th Cir. 1990).

In "traditional" arranger cases, the sole purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes. *See, e.g., Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 566 (9th Cir. 1994) (holding party arranged by selling contaminated wastes); *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 753 (9th Cir. 1994) (imposing liability where substance delivered to third party). The Oil Companies do not seek to establish liability against the Government based on one of the traditional approach [sic] to arranger liability. Rather the Oil Companies look to nontraditional methods of establishing arranger liability.

Courts have developed two lines of authority for determining arranger liability for cases which are not "traditional." *See United States v. Northeaster Pharmaceutical & Chem. Co.* ("*NEPACCO*"), 579 F. Supp. 823, 847 (W.D. Mo. 1984), *aff'd in pertinent part*, 810 F.2d 726, 743 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); and *United States v. Aceto Agri. Chem. Corp.* ("*Aceto*"), 872 F.2d 1373, 1382 (8th Cir. 1989); *see also Catellus, supra*, (quoting *Aceto*) and *Jones-Hamilton Co. v. Beazer Materials & Svcs.*, 959 F.2d 126, 131 (9th Cir. 1992) (following *Aceto* without expressly adopting it). The Oil Companies argue that under the *Aceto* standard, arranger liability should be imposed on the Government.[2]

Under *Aceto*, a party is liable as an arranger (1) if it supplies raw materials to be used in making a finished product, (2) and it retains ownership or control of the work in process, (3) where the generation of hazardous substances is inherent in the production process. *Aceto*, at 1379-80, 1382 (holding that party may be liable as arranger despite lack of direct authority to dispose or arrange); *see also Catellus*, at 752 (holding that continued ownership or control not required because would allow [sic] defendants to "close their eyes" to method of waste disposal).

According to the Ninth Circuit, on a motion for summary judgment, the question is "whether the fact-finder could infer from all the circumstances 'that a transaction in fact involves an arrangement for the disposal [or treatment] of a hazardous substance." *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d at 562 (quoting *Jones-Hamilton*, 973 F.2d at 695).

---

[2] The Government states that the Oil Companies seek to assert liability based on both the *Aceto* and *NEPACCO* standards. However, the Oil Companies do not in their papers address the possibility of liability under *NEPACCO*. Accordingly, this Court proceeds under only the *Aceto* standard.

B. The *Aceto* Analysis

The Government acknowledges that the generation of hazardous substances was inherent in the production of avgas. Thus, the third required element under *Aceto* is not disputed. *Id.*

1. Did the Government Own or Supply Raw Materials?

The Government contends that *Aceto* is inapplicable because the Government never owned or supplied any of the raw materials used in Defendants' production process. It has not been established that the Government owned any of the raw materials used in avgas production. The Oil Companies contend that the Government supplied the raw materials, by arranging and controlling which refineries could manufacture avgas components, and by arranging and controlling the delivery of such components.

In *United States v. Vertac Corp*, 46 F.3d 803 (1995), the Eighth Circuit addressed a similar issue, when an Agent Orange manufacturer counterclaimed under CERCLA against the Government, asserting that the Government's directives to suppliers amounted to supplying the components of Agent Orange.[3] The court held that, despite the directives requiring suppliers to send raw materials, the Government neither actively nor constructively supplied such materials to the manufacturer. This Court does not find *Vertac* persuasive. When the Government, as a practical matter, orders a private company to supply a finished product, dictates the delivery dates, the quantity to be shipped, the prices of the materials, the specifications of the raw materials, and provides the

[3] The *Vertac* cross-claimant, Hercules, was in a similar position to the Oil Companies, having been issued a federal directing [sic] ordering it to accelerate its production and delivery of Agent Orange, which resulted in Hercules' total devotion of its manufacturing plant to the production of Agent Orange.

transportation for the raw materials, there can be no question but that it is "*supplying*" the raw materials within the meaning of *Aceto*.

Further, the Government's control, even daily control, over the output of avgas produced by the Oil Company defendants, was pervasive and omnipotent. The Government, through its various departments, boards and commissions, coerced the Oil Companies into producing avgas, knowing full well that the acid sludge would be dumped. Undisputed evidence presented to this Court exists that during the relevant times the Government knew acid wastes were being dumped, and the Government attempted to divert the wastes, but its efforts were ultimately unsuccessful. When it was either unable or unwilling to allocate resources for the proper disposal of the wastes, the Government turned a blind eye to the problem. This is exactly the conduct that Congress intended to condemn, albeit retroactively, when it enacted CERCLA.

2. Did the Government Retain Ownership or Control of Avgas During Production?

There is no question of fact with respect to the Government's control over the production of avgas. It is undisputed that the Government, on a regular basis, controlled the specifications, quantities, delivery, and price of avgas. The undisputed facts reveal that the actions of the United States resulted in, as a practical matter, almost total control over the production of avgas.

C. Under Traditional Notions of Arranger Liability

Furthermore, certain facts have been presented to the Court upon which the Court could rest a traditional finding of arranger liability. The Government began to arrange for the disposal of acid wastes, by undertaking the responsibility for disposing of the sludge. Stip. Facts. at 87 (letter from PAW stating "*sludge disposal* problem was being left with WPB

since they have the over-all responsibility for industrial uses of acid"). The Government even undertook the rental of a storage tank, known as the Wilshire Storage Tank, for the disposal of some acid wastes. *Id.* at 78 (letter from WPB directing that DSC rent the storage tank from Wilshire). The Wilshire Tank stored spent alkylation acid for a short while, but, once filled to capacity, no other arrangements were made. As a result of a tank car shortage, the spent alkylation acid and the acid sludge were both dumped. The case law certainly supports the proposition that once an entity undertakes to arrange for disposal or treatment, it cannot abdicate responsibility when the disposal becomes infeasible.

D. Conclusion as to the United States' Arranger Liability Pursuant to CERCLA Section 107(a)(3)

Accordingly, the Court finds that the Government acted as an arranger with respect to the production and output of avgas during World War II and is thus liable as an arranger under CERCLA.

ORDER

Based on the pleadings filed herein and pursuant to Fed. R. Civ. P. 56(c), the Court finds:

(1) no genuine issues of material fact remain with respect to the United States' immunity under CERCLA. Accordingly, the United States' Motion for Partial Summary Judgment Based on Sovereign Immunity is DENIED;

(2) no genuine issues of material fact remain with respect to the Government's liability as an arranger under CERCLA Section 107(a)(3). Therefore, the Oil Companies' Motion for Partial Summary Judgment Against the United States for Liability Under CERCLA Section 107(a)(3) is GRANTED. The United States' Cross-Motion for Partial Summary Judgment on CERCLA Counterclaims is DENIED.

IV. OTHER MATTERS PENDING BEFORE THE COURT

The United States' Motion directed to benzol and toluene, with the consent of the parties, is declared moot. The United States' Motion for Partial Summary Judgment on the Pleadings to Dismiss Counterclaims Six Through Twelve is taken under submission.

This case is over four years old and has been the subject of protracted discovery. This Court has issued rulings regarding the liability of the principal parties in this litigation. From the Court's perspective, the bulk of the issues remaining pertain to liability apportionment. Accordingly, pursuant to Local Rule 23.4, the Court orders the parties to participate in a Mandatory Settlement Conference. The Clerk is directed to initiate the procedure designated by Local Rule 23.5.4.

It is ordered that within fifteen days of the date of this order, the parties shall submit a concise, joint status report, not to exceed ten pages, which shall disclose that which is required by Local Rule 6.4.2. It is further ordered that the parties shall file a Supplemental Joint Status Report, not to exceed three pages, within fifteen days of the settlement conference. The Supplement Joint Status Report shall inform the Court, quite specifically, of the posture, status and feasibility of settlement. All further proceedings in this litigation shall proceed forthwith.

IT IS SO ORDERED.

DATE: Sept 18, 1995

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
SR. UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Oct 12, 1999]

CASE NO. Civ. 91 0589 RJK(Ex)

FINAL JUDGMENT PURSUANT TO RULE 54(b) FRCP

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

SHELL OIL COMPANY, *et al.*,
Defendants,

AND RELATED ACTIONS

WHEREAS this Court entered partial summary judgment on behalf of Plaintiffs, the United States of America and the State of California, against Defendants, Shell Oil Company, Inc., Atlantic Richfield Company, Texaco, Inc. and Union Oil Company of California (hereinafter the "Oil Companies") on liability pursuant to the Complaint on September 29, 1993, in relation to the McColl Superfund Site located in the City of Fullerton, in Orange County, California;

WHEREAS this Court entered a "Partial Consent Decree Among Plaintiffs and Oil Company Defendants Regarding Certain Cost Claims and Order" on December 12, 1994, which resolved Plaintiffs' claims for recovery of costs incurred through approximately June 1990, which claims were paid by the Oil Companies in the amount of $18,000,000; and

WHEREAS the Partial Consent Decree, entered December 12, 1994, provides at paragraph 10 that the Judgment and Order filed by the Court on September 28, 1993, constitutes a declaratory judgment pursuant to 42 U.S.C. § 9613(g) (2) in favor of Plaintiffs against the Defendant Oil Companies for further response costs, which include all response costs with regard to the McColl Superfund Site incurred by the Plaintiffs after approximately June 1990;

WHEREAS this Court entered partial summary judgment on behalf of the Oil Companies against the United States as Counterdefendant on liability pursuant to Claims I and II of the Oil Companies' Counterclaim on September 18, 1995;

WHEREAS this Court entered a Memorandum and Order on August 12, 1998, allocating 100% of the liability for CERCLA response costs at the McColl Superfund Site to the United States as Counterdefendant;

WHEREAS the United States as Counterdefendant and the Oil Companies have stipulated to the response costs incurred or paid by the Oil Companies up to and including October 1998, in accordance with the terms of a "Stipulation" signed by the United States and the Oil Companies, dated September 30, 1999 ("Stipulation");

WHEREAS the United States and the State of California, as Plaintiffs, have outstanding demands against the Oil Companies for response costs incurred by the Plaintiffs for the period beginning in approximately June 1990, plus prejudgment interest from the applicable dates of demand, which costs have not yet been stipulated to by the parties;

WHEREAS the United States is presently responsible for 100% of the response costs incurred by the Plaintiffs, as a result of the Court's Memorandum and Order of August 12, 1998;

WHEREAS the Plaintiffs have continued to incur response costs in relation to the McColl Superfund Site and intend to assert additional cost recovery claims against responsible parties;

WHEREAS the parties have not completed their review of supporting documentation for the Plaintiffs' outstanding response cost claims, but have established a schedule to do so in the near future;

WHEREAS, subject to appeal, allocation of said response costs will be in accord with this Court's Memorandum of Decision and Order entered August 12, 1998, and proceedings with respect to the determination of said costs will continue in this Court under its continuing jurisdiction until resolved by stipulation or further proceedings;

WHEREAS the parties agree that Plaintiffs retain all their rights to pursue their claims for response costs to judgment in this Court, and the Oil Companies retain the right to seek allocation of those costs and additional response costs incurred since September 1, 1998, in accord with the Memorandum of Decision and Order entered August 12, 1998;

WHEREAS on April 28, 1997, the Oil Company defendants on one side and defendant McAuley LCX Corporation on the other dismissed with prejudice cross claims filed against each other;

WHEREAS on January 16, 1997, this Court entered a First Amended Consent Decree between Plaintiffs and Defendant, McAuley LCX Corporation, adjudicating all rights between said parties;

WHEREAS on or about March 12, 1993, the Plaintiffs and the Defendant Oil Companies dismissed without prejudice their claims against defendants Los Coyotes Estates, LTD, and Ramparts Research & Financial Corp.; and

WHEREAS, based upon these circumstances, the Court finds that judicial efficiency will be promoted by the entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as described below:

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Subject to its right to appeal the Court's Orders dated September 18, 1995 and August 12, 1998, the United States as Counterdefendant shall pay to the Oil Companies the amount specified in the Stipulation, on the schedule and in accordance with the contingencies and other terms set forth in the Stipulation. Said payment shall represent response costs incurred by the Oil Companies, including amounts paid to the plaintiffs, up to and including October 1998. Interest shall be determined and payable as provided by U.S.C. § 9607.

2. The Court will retain jurisdiction over outstanding consent decrees and claims not yet adjudicated.

3. The Court determines under Rule 54 (b) of the Federal Rules of Civil Procedure that there is no just reason for delay in entering final judgment upon the Plaintiffs' complaint and the Oil Companies' counterclaim based on the partial summary judgments, consent decrees, orders, dismissals and stipulations heretofore described, and hereby expressly directs that final judgment be entered, and the same here is entered.

Dated: Oct. 8, 1999

/s/ Robert J. Kelleher
The Honorable Robert J. Kelleher
UNITED STATES DISTRICT JUDGE

Judgment entered.

STIPULATION

1. This STIPULATION ("Stipulation") is entered into as of the 30th day of September 1999 between the Parties, the Plaintiff and Counterclaim-Defendant, UNITED STATES OF AMERICA ("United States") and the Defendants and Counterclaim-Plaintiffs, Shell Oil Company, Inc., Atlantic Richfield-Company, Texaco, Inc. and Union Oil Company (hereinafter the "Oil Companies").

2. The Parties hereby acknowledge that the United States is reserving all rights to appeal the Court's Orders dated September 18, 1995 and August 12, 1998 (the "Orders"), and that the Oil Companies are reserving all rights to appeal the Court's Order of September 29, 1993, and that nothing in this Stipulation shall in any way prejudice such rights of appeal.

3. In order to avoid any further litigation regarding the amount of the Oil Companies' claimed response costs under Counts I and II of the Counterclaim in this matter, the Parties stipulate in compromise that the Oil Companies' total claimed response costs (excluding interest but including payments made by the Oil Companies to Plaintiffs) through October 31, 1998 consists of the sum of $64,219,514.46.

4. If the orders are affirmed by a final order of a Federal district court from which there is no further appeal (hereafter, "final order"), or if the time for appeal from a final order runs without an appeal being filed, the United States shall pay to the Oil Companies the sum of $64,219,514.46. Such payments shall occur as soon as reasonably practicable after the United States receives notice of any final order, or upon the expiration of time for appeal without an appeal being filed. Interest shall be determined and payable as provided by 42 U.S.C. § 9607. In the event that the Orders are not affirmed in full, the Parties shall again negotiate in good faith to attempt to reach a stipulated payment for response costs.

5. The parties stipulate that payment shall be in the form of Electronic Funds Transfer in accordance with instructions provided by the Oil Companies.

6. In the event that payments specified by this Stipulation are not made within one hundred and twenty days (120) days of the United States' receipt of notice of a final order affirming the Orders, or upon the expiration of time for appeal without an appeal being filed, post-judgment interest on the unpaid balance shall be paid at the rate established pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), com-
mencing on the date the United States receives notice, or upon expiration of time for appeal, and accruing through the date of the payment.

7. The Parties to this Stipulation recognize and acknowledge that the payment obligations of the United States can only be paid from appropriated funds legally available for such purpose. Nothing in this Stipulation shall be interpreted or construed as a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

FOR THE UNITED STATES

LOIS J. SCHIFFER
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT & NATURAL RESOURCES
DIVISION

Dated: 9/30/99

By: /s/ Joshua M. Levin
JOSHUA M. LEVIN
MICHAEL J. ZEVENBERGEN
Environmental Defense Section
United States Department of
Justice

ALEJANDRO N. MAYORKAS
United States Attorney

JOHN RUBINER
Assistant United States Attorney
Central District of California
Counsel for the United States of America

FOR THE OIL COMPANY DEFENDANTS

MUNGER TOLLES & OLSON

Dated: 9-28-99

By: /s/ Ronald L. Olson
RONALD L. OLSON
PETER R. TAFT
CYNTHIA L. BURCH

Counsel for Shell Oil Company, Union Oil Company of California, Atlantic Richfield Company and Texaco, Inc.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Nov. 2, 1998]

NO. CV 91-0589-RJK

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELL OIL CO., *et.al.*,
Defendants.

MEMORANDUM OF DECISION AND ORDER RE GOVERNMENT'S MOTION FOR A NEW TRIAL

The Government's Motion for a New Trial is DENIED. Having reviewed the moving and opposition papers, the Court considers there are three issues that warrant brief discussion.

The first issue involves the so-called "cost-plus" contracts. The Government and the Court are not defining the term "cost-plus" the same way, but the semantic distinctions between these definitions are unimportant. It remains true that different prices were paid to different manufacturers based upon their estimated costs. Whether one chooses to call these "cost-plus" contracts or "estimated cost-plus" contracts is of no moment. Each definition reflects that the Government's need for the maximum quantity of avgas superseded its desire to keep costs to a fixed price, supporting the proposition that the Government would readily have assumed CERCLA costs had they been contemplated.

The second issue involves benzol waste. The Government claims that its concession of liability for benzol waste was a

concession of some liability, not full liability. Even assuming that the Government did not concede any liability for benzol waste, the Court still allocates 100 percent of the cost of cleanup of benzol waste to the Government. The Oil Companies treated Government-owned benzol in the production of cumene, an avgas additive. Responsibility for the waste is fully allocable to the Government for the same reasons that avgas sludge is fully allocable to the Government.

The third issue involves post-war dumping at the McColl Site. The Government contends that the liability for cleanup of avgas sludge ended when hostilities ended. This is clearly wrong for many reasons: the contract contained no such termination date; production of avgas for Government use continued for the entire period during which avgas sludge was produced; the production continued under the same Government dictated controls as applied during hostilities; War Production Board regulations continued for more than a year thereafter. It should go without saying that the economic relationship between the United States Government and American businesses did not instantly revert to a typical peacetime "market" economy on V-J Day. That some dumping occurred several months after the end of the war was considered by the Court in preparing the Memorandum of Decision and Order ("Order"). In any event, the record demonstrates that the Oil Companies turned to alternative disposal methods as rapidly as they became practicable.

Accordingly, the Motion for New Trial is DENIED.

The Oil Companies shall submit a Proposed Judgment.

IT IS SO ORDERED.

DATE: OCT 30, 1998

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA.

[Aug 11, 1998]

No. CV 91-0589-RJK

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELL OIL COMPANY, *et al.*,
Defendants.

MEMORANDUM OF DECISION AND ORDER

KELLEHER, District Judge.

The Court has presented for adjudication the question of the allocation of liability for the cost of cleanup of the McColl Superfund Site, a significant and deleterious by-product of the World War II aviation gasoline program. The United States of America ("the Government") has incurred substantial response costs in its attempts to clean up the McColl Site and seeks by this action to recover those costs from Shell Oil Company, Union Oil Company, Atlantic Richfield Company, and Texaco, Inc. (herein referred to as "Shell," "Union," "ARCO," and "Texaco," respectively and "the Oil Companies," collectively). Recovery is sought pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub.L. No. 96-510, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. 99-499, codified at 42 U.S.C. § 9607.

This Court has previously granted summary judgment holding both the Government and the Oil Companies liable as "arrangers" as this term is used in 42 U.S.C. § 9607. *See U.S. v. Shell Oil Co.,* 841 F.Supp. 962, 975 (C.D.Cal.1993) (holding Oil Companies liable); September 18; 1995, Order (holding Government liable).

Having found both the United States and the Oil Companies liable, all that remains is a determination, pursuant to 42 U.S.C. § 9613, of the proper allocation of response costs between the Government and the Oil Companies. The Court needs to determine only the percentage of liability allocable to the Government and the percentage of liability allocable to the Oil Companies.[1] The allocation issue was tried to the Court on February 17, 18, 19, 20, 23 and 24, 1998. Post-trial briefs were filed on April 2, 1998, and the matter stood submitted at that time.

There is presented the task of deciding and determining a factual issue in a manner different from any previously encountered by this Court. The difference arises from the unique and unusual discretion reposed in this Court by statute, which provides in relevant part:

> In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

42 U.S.C. § 9613(f)(1).

Courts have consistently recognized the broad discretion afforded by this statute to the District Court both in the selection of equitable factors to be applied and in the application of those factors. In *United States v. R.W. Meyer, Inc.,* 932 F.2d 568 (6th Cir.1991), the court noted:

---

[1] The Court need not determine the total amount of response costs nor determine the percentage of liability allocable to each individual company, as the Oil Companies have reached an agreement as to how their liability will be apportioned among them.

> Congress reemphasized that the trial court should invoke its moral as well as its legal sense by providing that the court use not just 'equitable factors,' which phrase already implies a large degree of discretion, but 'such equitable factors as the court determines are appropriate.' This language broadens the trial court's scope of discretion even further.

Id. at 572.

Thus, the Court finds itself in an unusual position—it is to act not only as a discretionary finder of fact but as a "finder of law" in a manner different from any usually required of a judicial officer acting in a non-jury proceeding insofar as the Court must choose which equitable factors are applicable to this case.

It is appropriate to consider early on the meaning, significance and proper application of the Court's function in these circumstances. This function is something other, different and more than the mere application of the rules of contract law to uncontested facts (as is largely the case here). In one sense, this case requires this court to determine in an unusual manner the rights, duties and obligations *inter se* of parties to a contract. But the problem is not that simple. In the fullest sense the Court is here faced with an unusual contract entered into in unusual times for unusual purposes under drastically different circumstances. The Court must here decide the relative obligations between the parties to a contract which is silent on the question here presented. Indeed, the question presented arises because of liability imposed by a statute enacted long after the contract was entered into and more than a generation after the contract was fully performed.

This is a case in which the Court is required to take a long delayed hindsight view and make an appraisal of what was done to win a war. The Court is not to determine how well it

was done, nor who deserves praise or criticism for what was done—it was done magnificently. We won the war, and what was here done was essential in that accomplishment. This is a case in which allocating "fault" as such is inappropriate. No one was at fault. Each party did what was necessary to achieve a common, paramount goal: victory in World War II. Nevertheless, this matter calls for the allocation per statute of responsibility for the cleanup of the McColl Site.

BACKGROUND

The McColl Superfund Site comprises roughly twenty-two acres in Fullerton, California. The hazardous waste located at the McColl Site consists primarily of acid sludge byproducts resulting from alkylation and other acid treating processes used in the manufacture of 100-octane aviation gasoline ("avgas") and other refinery products during World War II. During the war, the Oil Companies produced avgas, the most critically needed refinery product for the war effort, in extraordinary quantities at the demand of, and in fulfillment of contracts with, the Government. As noted above, these contracts were silent on the question of who should bear the burden of waste treatment.

The wartime economy

A survey of the relevant legislative enactments and Executive Orders of the time shows the degree of control exercised by the Government over the wartime economy generally and the petroleum industry specifically.

In May 1940, a National Defense Advisory Commission ("NDAC") was established to render non-binding advice on procurement policy. The NDAC was succeeded in 1941 by the Office of Production Management ("OPM"), which established an early priorities system to expedite delivery of essential materials to the Army and Navy. In August 1941, the Supply Priorities and Allocation Board ("SPAB") was estab-

lished to coordinate scarce material deliveries among competing agencies of the United States.

Shortly after the December 7, 1941, bombing of Pearl Harbor by the Japanese, Congress enacted the First War Powers Act "to expedite the prosecution of the war effort," 55 Stat. 838, 839 (1941) (codified at 50 U.S.C.App. § 611 (repealed 1966)). This Act gave broad power to the President to issue Executive Orders concerning the war effort.

In January 1942, President Roosevelt issued Executive Order 9024, which established the War Production Board. Pursuant to Executive Order 9024, the Chairman of the WPB was empowered to issue directives to industry in connection with war procurement and production, including directives with respect to purchasing, contracting, specification, construction, requisitioning, plant expansion, conversion and financing. At this time, the OPM and SPAB were eliminated and their duties were consolidated within the WPB. A subsequent order, Executive Order 9040, conferred upon the WPB the powers previously delegated to the Office of Production Management ("OPM") which, under Executive Order 8629, included the authority to "[f]ormulate and execute in the public interest all measures needful and appropriate in order . . . to increase, accelerate, and regulate the production and supply of materials, articles and equipment and the provision of emergency plant facilities and services required for the national defense"[2] and to "[f]ormulate plans for the mobilization for defense of the production facilities of the Nation, and to take all lawful action necessary to carry out such plans." The WPB's task was principally accomplished through use of intricate nationwide priority rankings system, under which the WPB

[2] To this end, the WPB maintained a short list of critical war products that were essential for combat activity. Avgas was on that list for the entire war.

reviewed requirements for goods appearing to be scarce, determined how much of each product or raw material was needed, and identified facilities to help meet this demand. Facilities were required to give priority to military contracts, and the President was authorized to regulate the flow of scarce raw materials where the use of such materials for national defense resulted in a supply shortage.

Under Executive Order 9040, the WPB was delegated the authority vested in the President of the United States by Section 120 of the National Defense Act of 1916, ch. 143, 39 Stat. 213 (1916), previously conferred upon OPM under Executive Order 8629, to seize the plants which did not comply with production orders and to enforce production orders under threat of criminal penalties.

The WPB's authority was again expanded by Executive Order 9125, which delegated to the WPB the powers vested in the President by Title III of the Second War Powers Act, ch. 199, 56 Stat. 176 (1942). This act, passed in March 1942, authorized the WPB to allocate not just "materials" deemed to be in scarce supply, but "facilities" as well. Additionally, the WPB could require a company to produce a good needed for the war effort where it was within the company's physical and technical capacity to do so. Executive Order 9125 provided that the Chairman of the WPB could exercise "the powers, authority, and discretion conferred upon him by this and any other Order through such officials or agencies . . . and in such manner as he may determine."

Additionally, there was a regulatory framework in place that specifically governed the petroleum industry. The United States set up the Office of Petroleum Coordinator for National Defense ("OPC") in May 1941 under the President's constitutional powers as Commander in Chief of the Army and

Navy.[3] The OPC's early authority was limited to the issuance of "Recommendations." In practice, as far as allocation of materials was concerned, the OPC and the OPM (later, the WPB), instituted a procedure by July 1941 whereby the OPC made priority determinations as to supplies for the petroleum industry and as to requirements for petroleum.

On December 2, 1942, President Roosevelt issued Executive Order 9276, which established the Petroleum Administration for War ("PAW"), a successor to the OPC, "in order to coordinate and centralize the war policies and actions of the Government relating to petroleum with a view toward providing adequate supplies of petroleum for the successful prosecution of the war and for other essential purposes." The order provided for the appointment of a Petroleum Administrator whose duties included, *inter alia,* "establish[ing] basic policies and formulat[ing] plans and programs to assure for the prosecution of the war the conservation and most effective development and utilization of petroleum in the United States and its territories and possessions," and "issu[ing] necessary policy and operating directives to parties engaged in the petroleum industry," provided that no directive of the Administrator conflict with any direction issued by the Chairman of the War Production Board.

Thus, the petroleum industry was subject not only to the general oversight of the WPB, which set policy for and issued mandatory regulations for the acquisition and disposition of scarce materials, but to the more specific oversight of the PAW, which instituted a petroleum blending program under which it dictated the quantity and quality of avgas and required quarterly inventory reports from all refineries, authorized purchase of certain quantities of raw materials, and

---

[3] Not until after the end of World War II was there a separate entity known as the Air Force. During all times here involved, the Army and the Navy each had its own aerial combat units.

instructed refineries with respect to manufacturing specifications. The purpose of the these actions was to maximize the amount of avgas available to the Government for purchase in order to pursue the war effort.

Throughout the war, policies and directives issued by the PAW remained technically subject to the review and approval of the WPB, but, in practical effect, the PAW's authority as an allocation agency was all but co-equal with the WPB. Indeed, with respect to some raw materials (such as sulfuric acid for alkylation), the authority of the WPB and the PAW overlapped.

Suffice it to say, the petroleum industry was essentially required to cooperate with the Government in providing essential resources to support our fighting forces and was subject to pervasive oversight by the WPB, PAW and other agencies of the federal Government. Under the wartime regulatory regime, the WPB could compel a refinery to maximize its existing capacity to produce avgas if that refinery had the ability to manufacture avgas. If the company refused to cooperate with the WPB or PAW, it would have been subject to takeover, and individuals who interfered with the Government's regulation of industry and acquisition of supplies would have been subject to criminal prosecution.[4]

The existence of an extensive degree of oversight of the petroleum industry and its avgas program by the Government is corroborated by thousands of pages of deposition testimony and documentary evidence submitted in this case and simply cannot be disputed.

It is at least of passing interest to note that this total and pervasive degree of oversight and control was exercised by

---

[4] For example, when a rent dispute threatened to shut down 16,000 to 18,000 barrels a day of avgas production at a Cities Service refinery in 1945, the Government promptly seized the refinery in order to protect avgas production.

the executive branch of the Government. It was at all times the statutorily conferred power of the President that was exercised. In addition to this power, the President as Commander in Chief of the Army and Navy exercised his constitutionally granted power to run the war. It was he who decided that we should build and send to war thousands of fighting aircraft. It was he who announced in his 1942 State of the Union Address that the United States would build 45,000 fighting aircraft in 1942.[5]

Despite the wartime circumstances and the attendant oversight of the Oil Companies by the Government, the relationship between the Government and the Oil Companies was a contractual one. The Government employed the Defense Supplies Corporation ("DSC") to finance alkylation facilities and to enter into three-year supply contracts for the purchase of avgas on behalf of the military. These three-year contracts were used both as financial incentives for building new facilities and to establish a centralized purchasing program over the entire output of avgas. These contracts were of the "cost-plus" variety, meaning that the Government would reimburse the Oil Companies for all the costs of avgas production plus a small profit, typically between 6 and 7 percent of costs. Thus, different prices were paid to different avgas manufacturers, depending on the costs of production. These prices were negotiated individually with each refiner after the submission of detailed production costs by the refiner. Each of the Oil Companies entered into one or more such contracts with the DSC.

Integral to the success of the avgas program was the Aviation Gas Reimbursement Plan ("AGRP"). The AGRP was a response to the Government's recognition that the rapid expansion of avgas production would require manufacturers

---

[5] In actuality, approximately 25,000 combat aircraft were constructed during 1942, and approximately 57,000 more were built in 1943.

to undertake extraordinary modes of operation which were often uneconomical and unanticipated at the time of the refiners' entry into their avgas contracts. Among the activities for which reimbursement could be sought under the AGRP were the shifting of gasoline components from refineries to others better able to utilize them, the readjustment of plant facilities and equipment, production of goods whose specifications were frequently and uneconomically changed by the military, and the use of cumene to meet new specifications or to increase production from existing components. The AGRP provided that the Government would compensate refiners directly, and fully, for extraordinary expenditures in connection with these activities. These reimbursements were paid to permit maximum production and utilization of avgas, irrespective of cost, and to shift the burden of unforeseen losses from the Oil Companies to the Government.[6]

The Government's constantly growing demand for avgas became so great that the Oil Companies were hard pressed to meet that demand. Production increased from 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945. In order to meet demand, the Oil Companies were required to increase greatly their use of sulfuric acid, albeit not quite as dramatically as the production numbers might seem to indicate.[7] As a byproduct of the enormous volume of fuel produced and acid used, the Oil Companies were confronted with quantities of spent alkylation acid and acid sludge that were too great to be reused, treated or disposed of under then-

---

[6] Indeed, the parties have stipulated that this was explicitly stated by PAW Administrator Ickes, who noted: "I know that maximum production may often result in uneconomic operations, but the provisions of the Aviation Gasoline Reimbursement Plan have been designed to permit Government to assume the burden of any such losses."

[7] The increase in sulfuric acid use was five-fold.

existing circumstances.[8] With at least tacit approval from the Government, the Oil Companies contracted with Eli McColl to transport waste away from their refining facilities and dump it at the McColl Site.[9] This dumping began in June 1942 and continued until September 1946.

Avgas production and avgas waste

There were three types of waste dumped at the McColl site: (1) acid sludge from benzol production; (2) other acid sludge; and (3) spent alkylation acid. In a contract separate from the avgas program, Shell manufactured benzol for the Government. This process yielded acid sludge. The Government does not contest its liability for the benzol waste, which makes up between 5 and 6 percent of the waste at the McColl Site.

The other two types of waste can be traced to the production of avgas. To meet the exacting octane and volatility requirements of the high-compression aircraft engines used at the time, the Oil Companies[10] would blend several different elements to create the special fuel used in our nation's high-performance aircraft in World War II. The first element was aviation base stock, which was similar to normal motor gasoline and composed 40 to 50 percent of avgas. Also added were iso-pentane, cumene and tetra-ethyl lead. These components made up between 10 and 35 percent of avgas. The final element (and the most important for purposes of this proceeding) was alkylate, which was produced by a process known as alkylation and composed 25 to 40 percent of avgas.

---

[8] Prior to World War II, waste had been transported to and acceptably disposed of at other sites.

[9] On June 8, 1942, Eli McColl obtained a permit from the City of Fullerton to dump acid sludge at the McColl Site. It is undisputed that the dumping was legal at the time.

[10] Each of the Oil Companies named as parties operated one or more refineries in the vicinity of Wilmington, California, for the production of, among other things, avgas.

Alkylation involved combining molecules of lighter weight petroleum fractions to produce iso-octane. The most efficient method of producing alkylate was to mix iso-butane with butylene in the presence of 98 percent sulfuric acid.[11] This process yielded the alkylate and a by- product of 89 percent spent alkylation acid.

The spent alkylation acid was put to several productive uses by the Oil Companies. One such use was the acid treatment of avgas base stocks to remove sulfur compounds and thus improve the quality of the stocks. Another was the acid treatment of certain components before they entered the alkylation process in order to remove impurities and improve their quality. Additionally, the spent alkylation acid was used by the Oil Companies in the manufacture of other, non-avgas products. All of these uses of the spent alkylation acid produced acid sludge.

Thus, from the time it entered the refinery as "fresh" 98 percent sulfuric acid until its departure in the form of acid sludge, the acid could perform two functions: (1) alkylation, which would turn the acid into 89 percent spent alkylation acid and (2) acid treating of avgas components or other refinery products, which would transform the 89 percent spent alkylation acid into acid sludge. However, the quantity of spent alkylation acid on hand would, at times, exceed (often greatly) the amount that could be used for acid treating. This resulted in the dumping of 89 percent spent alkylation acid before it was used for acid treating.

ANALYSIS

As far as the application of relevant equitable factors is concerned, there are two determinations to be made that are of

---

[11] Sulfuric acid is used by refineries primarily as a catalyst or for treatment of product. Generally, it is not incorporated into products leaving the refinery. Thus, virtually all of the acid coming into the refinery must leave the refinery after use.

obvious and overriding importance: (1) the percentage of the McColl Site waste attributable to the avgas program; and (2) the percentage of that waste for which each party is responsible.

The first inquiry seeks to do by reason that which cannot be done by scientific trial; namely, to take a teaspoon, scoop up a measure of sludge and, through analysis of the sample, determine what percentage of the sludge in that teaspoon is avgas sludge.

The second inquiry is more conventional. Once a percentage is affixed to the amount of sludge attributable to avgas production, it seeks to determine how much responsibility for that sludge the Government and Oil Companies each must bear.

A. The Government's uncontested liability

In this analysis where much is contested, but one of the few points of agreement is that the Government is wholly responsible for acid waste resulting from acid treating in the production of benzol. The parties have stipulated that 9 percent of Shell's waste sent to the McColl Site resulted from the acid treatment of benzol. The parties agree that Shell contributed at least 61 percent of the total waste at the McColl site.[12] Thus, the Government is wholly responsible for that 5.5 percent (61 percent of 9 percent) of the total waste at the McColl Site.

---

[12] There are three different estimates of the percentage amount of Shell's contribution, but 61 percent is the lowest estimate.

B. A minimum, but incomplete, estimate of the percentage of waste attributable to the avgas program

1. Spent alkylation acid

The parties have agreed that the spent alkylation acid dumped at the McColl Site between late 1944 and early 1945 is entirely attributable to the avgas program. This constitutes approximately 12 percent of the total waste at the McColl Site.

2. Acid sludge

The Court heard expert testimony from Robert Anderson, a refinery operations expert, who testified that 13 percent of the sludge at the McColl Site can be attributed to the avgas program. For reasons more fully explained in Section C, *infra*, the Court is not satisfied that this represents a complete accounting of waste attributable to the avgas program, but it is quite useful in providing at least a minimum estimate.

C. 100 percent of the non-benzol waste at the McColl Site is attributable to the avgas program

During the period in question, avgas was not the only product manufactured by the Oil Companies that required acid treating. The Oil Companies also produced motor fuel, kerosene, and lubricating oils, all of which were acid treated using spent alkylation acid.[13] Thus, in the course of its transformation from 98 percent "fresh" sulfuric acid to acid sludge, the acid assisted in the manufacture of both avgas and other products. Not surprisingly, the parties have fundamentally different views as to how much of the sludge is attributable to avgas and how much is attributable to other products.

---

[13] Although some of these products were manufactured for the Government, to hold the Government liable on an arranger theory for sludge attributable to these products is beyond the scope of this case. See September 18, 1995, Order at 19.

1. The Oil Companies' "branding theory"

The Oil Companies contend that all alkylation acid that was in any way a part of the manufacture of avgas should be attributed completely to the avgas program.

The Government has, somewhat derisively, referred to this a the "branding theory"—that all sludge that has been involved in any way in the manufacture of avgas is to be "branded" as avgas sludge. Although this label is somewhat pejorative, it is precisely what the Oil Companies suggest.

2. The Government's "sponge theory"

The Government's theory can perhaps best be summarized by reference to an example used by their expert witness, Robert Anderson. Anderson testified that it is possible to determine what percentage of the acid sludge at the McColl Site is attributable to the avgas program by comparing the actual amount of sludge present with the amount that would have been present had the Oil Companies been using fresh acid instead of spent alkylation acid in the acid treatment of non-avgas products. He likened this increase to use of a wet sponge as opposed to a dry sponge:

> Let's consider [the sulfuric acid] to be a sponge. So we are soaking up all these bad molecules into the sponge, which is the acid water mixture. When that sponge becomes saturated with bad molecules, we've got to throw it away and we'll throw it away at McColl.
>
> Now, had we started with fresh acid, we would have started with a dry sponge. It would have become saturated and we would have thrown away a sponge at McColl . . .
>
> Now, we are starting not with fresh acid, but with spent acid, which means it's a damp sponge. It's already got some bad molecules in it. When we saturate that, we wouldn't be able to pick up as much because the

sponge started out damp. So at the damp sponge starting point we need a bigger sponge.

(Tr. 558:13-559:2)

3. The Court's theory

Not surprisingly, the competing theories yield attribution results that are highly favorable to their proponents and come nowhere near adding up to 100 percent. The Court is not satisfied with either of the competing attribution theories proposed by the parties. The problem with the branding theory is that the acid was used—at least in part—to treat non-avgas products. The extent to which the waste problem at the McColl Site was aggravated due to this secondary use of the acid is ignored entirely by the branding theory.

With respect to the Government's theory, the assumption is that the same amount of acid treating of non-avgas products would have occurred irrespective of the existence of the avgas program. This is utterly implausible. The evidence shows with unquestionable certainty that the acid- treating of avgas base stock in the amount demanded by the Government was going to happen as it in fact happened irrespective of what the Oil Companies did with the leftover spent alkylation acid. The Companies had massive surpluses of spent alkylation acid that they would not have had but for the avgas program. It is surely the case that much of the acid treating of non-avgas products, acid treating that often was not necessary but merely preferable, occurred solely because the acid was on hand and had to be put to some use or dumped.[14] It must also be true that greater quantities of non-avgas products subjected to acid treating were produced solely due to the presence of enormous excess quantities of spent alkylation acid and the

[14] Indeed, the spent alkylation acid could not even have been recycled due to the unavailability of tank cars and/or regenration plants. *See* Sections D2 and D3, *infra.*

increase in crude oil throughput at the refineries occasioned by the avgas program.

In sum, both the Oil Companies' and the Government's attribution theories operate on the premise that the proper starting point for the analysis is 100 percent attribution to the other party. The Government's theory then uses a "marginal waste created" (for lack of a better term) analysis in an attempt to determine the most favorable (i.e.smallest) attribution of waste to avgas.

Essentially, the Government's theory poses the question "Assuming (1) that all of the Oil Companies non-avgas use of acid would have occurred as it in fact did occur irrespective of the avgas program and (2) the sludge created from this amount of use is wholly attributable to the Oil Companies, how much extra waste did the acid treatment of avgas stocks create?"

The Oil Companies' theory poses the question "What percentage of the acid at the McColl Site ever went through the alkylation unit?"

In the Court's view, the proper question is "Given that all of the treatment of avgas stocks was going to occur as it in fact did occur irrespective of the Oil Companies' plans to make other products using spent alkylation acid, how much additional waste was created by the Oil Companies secondary use of the acid?"[15]

In the thousands of pages of documents, deposition transcripts, and trial transcripts submitted in this action, this question goes unanswered. However, one important fact is clear: the primary contaminant at the McColl Site is the

---

[15] Essentially, this adopts the baseline starting point set forth by the Oil Companies and the "marginal waste created" method of analysis set forth by the Government. Instead of applying that analysis to avgas (as the Government advocates), the Court seeks to apply that analysis to non-avgas products.

sulfuric acid. This acid would be present in the same (or slightly greater) quantities irrespective of whether the Oil Companies had chosen to make secondary use of the acid for non-avgas products. Had the waste dumped at the McColl Site been purely spent alkylation acid, the Court (and presumably the parties) would readily attribute 100 percent of that waste to the avgas program. Without persuasive evidence that the secondary use of the spent alkylation acid substantially aggravated the waste cleanup problems at the McColl Site beyond what they would have been in the absence of that secondary use, the Court cannot say that the secondary use of the spent alkylation acid by the Oil Companies materially aggravated the waste treatment problems at the McColl Site.

Although the Court does not accept the Oil Companies' attribution theory, it does adopt the result sought by the Oil Companies and finds that 100 percent of the non-benzol waste at the McColl Site is attributable to the avgas program.

D. The Government should bear 100 percent responsibility for waste attributable to the avgas program

After reviewing the evidence and applying such equitable factors as appear appropriate, the Court is convinced that the Government should bear total responsibility for any waste attributable to the avgas program for three reasons: (1) such a result simply places a cost of the war on the United States and thus on society as a whole, (2) the Oil Companies were unable to transport avgas waste to Richmond for recycling due to the unavailability of tank cars, and (3) the Oil Companies were unable to construct treatment plants due to the WPB's refusal to issue priorities. Each of these reasons appears to the Court to be a compellingly appropriate equitable factor to support the Court's conclusion.

1. The sludge and the cost of its cleanup were costs of World War II

This case is similar in many respects to *FMC Corp. v. U.S. Department of Commerce,* 786 F.Supp. 471 (E.D.Pa.1992), affirmed at 29 F.3d 833 (3rd Cir.1994). *FMC* involved a Virginia facility that manufactured high tenacity rayon for use in World War II. In 1982, inspections revealed that carbon bisulfide, a chemical used in the manufacture of high tenacity rayon, was present in the ground water in the vicinity of the plant. Consequently, the EPA began cleanup operations and notified FMC of its potential liability under CERCLA. In 1990, FMC filed suit, alleging that, as a result of the Government's activities during World War II, the United States was jointly liable with FMC as an "owner" and "operator" of the facility, and as an "arranger for disposal" of hazardous wastes there, within the meaning of 42 U.S.C. § 9607(a). In particular, FMC claimed that the Government became involved so pervasively in the facility that it effectively operated the plant along with American Viscose (the prior owner of the plant) and, accordingly, should share in the response costs. This argument prevailed in the District Court.

In affirming the District Court's finding of government liability,[16] the Third Circuit wrote:

> Furthermore, we point out that at bottom our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy underlying CERCLA.

29 F.3d at 846.

---

[16] In *FMC,* no allocation trial was held as the parties reached a settlement with respect to the allocation issues.

This statement is of equal force in the context of this allocation proceeding. As discussed above, the avgas program is one in which the degree of Government oversight was extraordinarily high. Indeed, had the Oil Companies' performance in the supply of avgas fallen short of requirements, the Government could have gone so far as to seize the plants. An allocation to the Government of liability for waste that is attributable to a war-time program is wholly consistent with the policy underlying CERCLA (as discussed in both the Third Circuit's *FMC* opinion and this Court's September 18, 1995, Order) and indeed simply places a cost of the war on the United States and thus on society as a whole. So long as responsibility being allocated is responsibility only for waste attributable to avgas production, it stands to reason that just as the American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort, the production of avgas waste.

2. Tank cars were unavailable to the Oil Companies

Furthermore, even if the Court were of the view that, during the pendancy of the war, the Oil Companies were responsible for facilitating the proper disposal of avgas waste, the Court is convinced that the Oil Companies had no reasonable recourse to on-land dumping of the sludge due to the conduct of the WPB.

The Oil Companies have made a strong showing that this was indeed the case. In the years prior to the war effort, acid sludge was routinely transported in special lead-lined tank cars to the Shell Point facility in Richmond, California, for reprocessing into fertilizer. Between 1936 and 1939, when tank cars were available, the Oil Companies transported more than 86,000 tons of sludge to the Shell Point facility.

During the war, the lead-lined tank cars were needed by the Government for war purposes.[17] Thus, the cars were rarely available for the transportation of sludge to Shell Point.[18] Indeed, in his testimony before the Los Angeles Planning Commission in May 1942, Eli McColl stated that the reason he was applying for permit to dump waste at the McColl Site was that the Government would not allow his or the companies he represented to use tank cars to ship acid to northern California for use as fertilizer.

Between 1941 and 1943, the total amount of sludge transported to Shell Point dropped to less than 2,000 tons. As soon as tank cars again became readily available near the end of the war, the large-scale transportation of sludge to Shell Point via tank cars resumed. Given the pattern of transport both before and after the war, one can be sure that had lead-lined tank cars been available throughout the war years, the Oil Companies would have made use of them.

3. The Government repeatedly rebuffed the Oil Companies' attempts to obtain priorities to build regeneration plants.

From the beginning of the avgas program, the Government was aware that spent alkylation acid and acid sludge were produced in the manufacture of avgas and that increasing production of avgas would increase the amount of spent alkylation acid and acid sludge produced. The construction of new facilities to reprocess these avgas byproducts required WPB approval because without WPB approval the materials

---

[17] Ironically, the primary war-related use for the lead-lined tank cars appears to be the transportation of fresh sulfuric acid. A WPB publication dated December 9, 1944, stated that it was not just sulfuric acid that was in short supply, but that "tank cars are more critical than the product they carry."

[18] For the months of December 1943 through May 1944, Shell and Union were able to obtain tank cars to ship sludge to Shell Point.

needed for construction could not be obtained. Decisions on the construction of such plants were made pursuant to the WPB's powers to allocate resources for the war effort.

During the war, Shell sought to build a spent alkylation acid decomposition plant in Houston. It sought to spend more than $1 million of its own funds to this end. On October 13, 1944, the Inorganic Acids Committee of the WPB rejected this request on the ground that when considering the need for fresh acid, an original sulfuric acid plant could be built with fewer resources than a spent acid decomposition plant.

Similarly, the stipulated facts establish than Texaco sought to build an acid reconcentrator to treat both spent acid and acid sludge as part of a larger proposal. The WPB eliminated this portion of the proposal on the ground that the acid requirements of Texaco could be provided from other sources.

After review of evidence of the denial of these two attempts to obtain priorities for the construction of treatment plants, as well the evidence submitted concerning the denial of the Tidewater request and the grant of the Stauffer request, it is clear that the Government's policy with respect to spent acid or acid sludge was not to grant priorities unless the plant was needed to provide fresh acid for use in the manufacture of avgas.

It is likely that this policy was that which best furthered the war effort. However, it came at the expense of the environment as, in combination with the unavailability of tank cars, it left the Oil Companies with no reasonable choice but to dump acid sludge. Simply put, the Government's war requirements created the waste and Government acts or omissions foreclosed the reasonable alternative methods of disposal (transportation via tank cars for recycling or construction of regeneration plants) of the waste. Having created the problem and foreclosed the possible solutions, the

Government will receive a 100 percent allocation of waste attributable to the avgas program.

E. The benefits the Oil Companies received from the avgas program do not warrant any offset in favor of the Government.

In addition to the profits the Oil Companies received under their avgas contracts, it is clear from the evidence that the Oil Companies received economic benefits from the avgas program. Chief among these benefits was accelerated amortization of new facilities constructed during the war. This tax benefit allowed the Oil Companies to defer taxation.

The Government contends that this is an equitable factor to be counted against the Oil Companies. The Court disagrees. The extent of this and other benefits is hotly contested, but the existence of the Renegotiation Acts greatly simplifies the inquiry.

After the entry of the United States into World War II, Congress enacted the Renegotiation Act of 1942, or "First Renegotiation Act," 56 Stat. 245 (1942). This act called for the renegotiation of wartime contracts after the end of the war and provided for the retention by the Government or repayment to the Government of excessive profits realized by those who entered into contracts with the Government "whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized . . . may be excessive . . . ."[19]

Seeking to make administration more uniform, Congress rewrote the Renegotiation Act on February 25, 1944 ("Second Renegotiation Act"). The Second Renegotiation Act

---

[19] The benefits of the accelerated amortization afforded by a Certificate of Necessity were among the profits considered under the Renegotiation Acts.

established a central War Contracts Price Adjustment Board, consisting of officials from contracting agencies.

Pursuant to the regime set forth in the Renegotiation Acts, matters relating to profits from the contracts between the Government and the Oil Companies, termination costs, and all other issues concerning the instant contracts were settled between the parties in the late 1940s.

Although this renegotiation does not legally estop the Government from contending that the Oil Companies garnered excessive profits, it strongly indicates that this was not the case. To be sure, the Oil Companies are, by any measure, very successful business entities. However, the Court is ill positioned to attempt to trace the profitability of the Oil Companies back to their avgas contracts.

To the extent the Court considers it can make an independent determination of the profitability of the Oil Companies' participation in the avgas program, it appears that the Oil Companies did not excessively profit. The accelerated depreciation allowances granted the Oil Companies can be viewed as merely part of the price of seeking the hasty construction of new avgas facilities in wartime, facilities predominantly built with the Oil Companies' own money that would be far less expensive and better constructed if built in peacetime. Indeed, the tax advantages were available only to facilities built pursuant to Certificates of Necessity, which is to say that it had been determined that the construction, reconstruction, erection, installation, or acquisition of the facility was necessary in the interest of national defense. Furthermore, if a facility was determined to have full post-war value, it would not receive a Certificate of Necessity. Those facilities with limited post-war value would only receive Certificates of Necessity for costs in excess of post-war value.

The Government considered the tax advantages and other benefits received by the Oil Companies at least twice: once in the course of dealing during the war and once when the contracts were renegotiated shortly after the war. Each time, the Government determined that it was getting a fair deal, which is to say that the Oil Companies were not receiving undue benefits from the bargain at taxpayer expense. These determinations having been twice made by factfinders better situated both spatially and temporally than this Court, the Court will not revisit these determinations. In any event, the Government has failed to produce adequate evidence in these proceedings that it is entitled to an offset. Accordingly, the Court determines that the Government is not entitled to any offset based upon benefits received by the Oil Companies.

CONCLUSION

In the final analysis, the Court has taken to heart as well as to mind the extraordinary problems here presented by World War II and this action. The Court has taken to heart and to mind the unusual mandate of the Congress to "us[e] such equitable factors as the Court determines are appropriate."[20] In doing so, the Court has invoked "its moral as well as legal sense.[21]

CERCLA in its broad application discloses a long-delayed recognition by Congress that something drastic must be done about pollution of the earth and the atmosphere. The broad discretionary role assigned by Congress to judges presiding in allocation proceedings discloses recognition of the special need to avoid drastic and unfair imposition of liability on innocent parties.

---

[20] 42 U.S.C. § 9613(f)(1).

[21] *See United States v. R.W. Meyer, Inc., supra.*

In looking at the CERCLA statute, it appears to the Court that Congress must thereby have had in mind unusual cases such as this. At very least, Congress appears to have decided to allow the District Judge to recognize an unusual case which calls for an unusual disposition.

The benefits of avgas to the war effort were such that the United States was willing to incur almost any cost to obtain the maximum quantity and quality of avgas. Indeed, the Government paid substantially higher prices for gasoline produced by Government-built and- owned plants than it did to the party Oil Companies in order to meet its requirements. This willingness to absorb all costs irrespective of the impact on the final price of avgas was reflected in the both the "cost-plus" contracts for avgas and the existence of the AGRP. During World War II, neither the Government nor the Oil Companies foresaw that the method of disposal of acid waste to land at the McColl Site, which was done in a manner acceptable at the time, would years later be declared illegal and be subjected to a regulatory cleanup process.

Despite the size of the response costs, the Court is confident that, had the future CERCLA regime been foreseen by the parties, the Government would have agreed to pay for the costs of cleanup of the McColl Site (or any other unforeseen cost) in the blink of an eye, just as it agreed to reimburse the Oil Companies for extraordinary expenditures under the AGRP. At one level, this case can be viewed as a sort of extension of the regime that included cost-plus contracts, the AGRP plan, and the Renegotiation Acts. This is a regime that sought to win a war at any dollar cost without allowing those whose cooperation was needed to make excessive profits. After the war, it was determined that the Oil Companies profits were not excessive but merely reasonable. The *post hoc* imposition of the costs here at issue more than fifty years after full performance of the contracts would surely alter that determination.

In conclusion, the war caused the problem and like myriad others the burden must rest on the United States, which is all of us. The United States won the war and all of us paid the costs at the time. This is another such cost merely long delayed.

Having found that (1) 100 percent of the benzol-related sludge at the McColl Site is attributable to the United States, (2) 100 percent of the non-benzol sludge at the McColl Site is attributable to the avgas program and (3) the United States is wholly liable for all sludge at the McColl Site that is attributable to the avgas program, the Court finds, pursuant to 42 U.S.C. § 9613(d), that the proper allocation of response costs between the Government and the Oil Companies is as follows: 100 percent allocation of liability to the United States and zero percent allocation of liability to the Oil Companies.

The foregoing factual recitals and determinations shall constitute the Court's Findings of Fact and Conclusions of Law. Each such finding of fact and conclusion of law has been considered and used by the Court in reaching its allocation of response costs.

Judgment will be entered accordingly.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

[Filed Sept. 28, 1993]

No. CV 91-0589-RJK

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

SHELL OIL CO., *et al.*,
Defendants.

And Related Claims.

MEMORANDUM OF DECISION AND ORDER

KELLEHER, District Judge.

In this action, the governments of the United States and the State of California (collectively "the governments") seek to recover costs incurred, and declaratory relief as to liability for costs yet to be incurred, in responding to the presence of hazardous wastes at a site in Fullerton, California known as the McColl Site ("the Site"). Recovery of response costs is sought pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub.L. No. 96-510, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. 99-499, codified at 42 U.S.C. § 9607(a). Declaratory relief is sought pursuant to CERCLA section 113(g)(2), codified at 42 U.S.C. § 9613(g)(2).

The governments seek recovery from: Shell Oil Company ("Shell"), Union Oil Company of California ("Union" or "Unocal"), Atlantic Richfield Company ("Arco" or

"Richfield"), and Texaco, Inc. ("Texaco") (collectively "the oil companies") and McAuley LCX Corporation ("McAuley").[1] The oil companies are charged as successors in interest to the corporations that generated the hazardous wastes and arranged for their disposal at the McColl Site. McAuley is charged as an owner or operator of part of the McColl Site.

The governments move the Court for partial summary judgment as to Defendants' liability for response costs at the McColl Site under section 107 of CERCLA.[2] The parties also have filed opposing motions for bifurcation and trifurcation of various phases of this litigation. These relate to the order in which the governments' cost recovery phase and the Defendants' counterclaims and cross-claims are resolved. By this Memorandum of Decision and Order the Court disposes of all these pending matters.

BACKGROUND

The McColl Superfund Site comprises roughly twenty-two acres in Fullerton. It is bordered by housing developments, a country club golf course, a regional park, and an oil field. The Site is divided into two distinct areas: the Ramparts area and the Los Coyotes area. The Ramparts area occupies vacant land. It contains six large pits, or sumps. The Los

---

[1] The governments originally named Ramparts Research & Financial Corporation ("Ramparts"); and Los Coyotes Estates, Ltd. ("Los Coyotes") as defendants as well. There is no indication in the record that either Ramparts or Los Coyotes was ever served, and neither has appeared in the case. On March 11, 1993, the governments voluntarily dismissed their claims against Ramparts and Los Coyotes. On March 15, 1993, the oil companies voluntarily dismissed their cross-claims against LCE and Ramparts. Thus, Ramparts and Los Coyotes are no longer defendants in this action.

[2] The governments filed separate parallel motions for summary judgment as to the liability of the oil companies and McAuley.

Coyotes area is land that once was part of the Los Coyotes Country Club golf course. It contains six sumps which underlie what were portions of the golf course.

The hazardous waste located at the McColl Site consists of acid sludge byproducts of alkylation processes used by the oil companies during World War II to produce high octane aviation fuel. During the war, the oil companies produced this aviation fuel in extraordinary quantities at the demand of, and in fulfillment of supply contracts with, the federal government.

The oil companies have submitted many thousands of pages of deposition testimony and documentary evidence to illustrate the degree of oversight exercised by the federal government over the oil companies' production of this aviation fuel. A clear picture emerges from this evidence of the backdrop of federal governance over the oil companies during the war. In addition, the Court possesses considerable first-hand familiarity with the manner in which the government regulated industry during the war.

As part of the United States' war effort during World War II, the federal government implemented a regulatory regime under which all industries were required to cooperate with the government in providing the necessary armaments and supplies to support our fighting forces. Not unlike other industrial sectors, the petroleum industry was subject during the war to pervasive oversight by agencies of the federal government. Under the wartime regulatory regime, an oil company that refused to cooperate with the federal government would have been subject to government takeover. And individuals who interfered with the government's regulation of industry and acquisition of supplies would have been subject to criminal prosecution.

Notwithstanding the government's intrusive regulatory power over the oil companies during the war, it is beyond

dispute that the oil companies entered into their contracts to supply the federal government with aviation fuel volitionally. In what measure the oil companies' willingness to enter into these supply contracts was due to a sense of civic duty, as opposed to the evident profitability of the contracts, is impossible to determine and immaterial to the issues presently before the Court.

During the war the government's constantly growing demand for aviation fuel became so great the oil companies were hard pressed to meet that demand. As a byproduct of the enormous volume of fuel produced, the oil companies were confronted with quantities of acid sludge waste too great to be treated or disposed of in their existing facilities. The government urged the oil companies not to allow the accumulation of this waste to interfere with the production of aviation fuel. With at least tacit approval from the government, the oil companies disposed of their waste problem by contracting with Eli McColl to transport the acid sludge away from their refining facilities and dispose of it by dumping it in the unlined pits, or "sumps," on the plot of land in Fullerton now referred to as the McColl Site. Although the government was aware, and in some measure approved, of the oil companies' disposal of the acid sludge, the choice to arrange for waste disposal in the manner described was made by the oil companies.

The dumping of acid sludge at the McColl Site ceased shortly after the end of World War II. In the 1950s, the City of Fullerton requested that McColl fill in the acid sludge-filled sumps in preparation for residential development in the immediate vicinity of the Site. McColl requested and received assistance from the oil companies, who acknowledged their responsibility for the presence of the acid sludge in those sumps.

Some time after the sumps had been covered over, the Los Coyotes Country Club was built and part of the Site was

developed into a portion of the club's golf course. McAuley subsequently purchased the club, which it has owned and operated for over a decade. Prior to purchasing the club, McAuley was made aware of the presence of the sumps beneath the golf course and commissioned an environmental assessment in late 1980, shortly before purchasing the club.

For over a decade, the acid sludge at the McColl Site has been oozing up through the surface of the ground. There are approximately 100,000 cubic yards of waste and contaminated soils at the Site. The waste at the Site includes benzene, toluene, xylene, arsenic, sulfur dioxide, hydrogen sulfide, and tetrahydrothiopene.

STANDARD OF REVIEW

In ruling on a motion for summary judgment, the Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact. Fed.R.Civ.P. 56(c); *Federal Deposit Ins. Corp. v. O'Melveny & Myers*, 969 F.2d 744, 747 (9th Cir.1992) (citing *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385, 387 (9th Cir.1990), *aff'd*, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991)). Summary judgment is appropriate whenever the pleadings and evidence establish that there are no genuine issues as to any material fact. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Manzanita Park v. Insurance Co. of North America*, 857 F.2d 549 (9th Cir.1988). Thus, summary judgment should be granted so long as the evidence before the court demonstrates that after adequate time for discovery, there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986).

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a "reasonable jury" to return

a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S.Ct. 2505, 2510- 11, 91 L.Ed.2d 202 (1986). Evidence that is merely colorable or that is not "significantly probative" does not raise a genuine issue of material fact and the mere possibility that the nonmoving party may discredit the moving party's testimony at trial will not suffice to defeat a properly presented motion. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.1989) (en banc) (citing *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11).

Courts have readily granted summary judgment as to various issues, including liability, in the context of potentially intractable CERCLA cases. *E.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir.1989); *United States v. Stringfellow*, 661 F.Supp. 1053, 1058 (C.D.Cal.1987).

DISCUSSION

In order to establish liability for response costs pursuant to section 107 of CERCLA, the governments must establish four elements: (1) the McColl site is a "facility"; (2) a "release" or "threatened release" of a "hazardous substance" from the site has occurred; (3) the release or threatened release has caused the governments to incur response costs; and (4) the defendants fall within at least one of the four classes of covered persons.

CERCLA "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed." *3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1357 (9th Cir.1990).

Section 107(a) provides in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection
>
> (b) of this section—

(1) the owner and operator of a . . . facility,

. . . .

(3) any person who . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, . . .

. . . .

. . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States or a State . . . not inconsistent with the national contingency plan. . . .

42 U.S.C. § 9607.

Congress intended that responsible parties, not the general citizenry, "bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator. . . ." Senate Comm. on Environment and Public Works, S.Rep. No. 848, 96th Cong., 2d Sess. 98, (1980) *reprinted in,* 1 CERCLA Leg.Hist. at 405 (1980). And Congress intended to make parties covered by section 107(a) strictly liable, in that no showing of fault is required, for response costs, subject only to the limited affirmative defenses set forth in section 107(b). *New York v. Shore Realty,* 759 F.2d 1032, 1042 (2d Cir.1985) (citing 126 Cong.Rec. 30,932 (statement of Sen. Randolph)).

Among responsible parties, that is all parties covered by the four classes, liability is joint and several. *E.g., United States*

v. American Cynamid Co., 786 F.Supp. 152, 164 (D.R.I.1992); *United States v. Stringfellow*, 661 F.Supp. 1053, 1060 (C.D.Cal.1987); *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 811 (S.D.Ohio 1983), *cited with approval in* House Committee on Energy & Commerce, H.Rep. No. 253, 99th Cong., 2nd Sess. Pt. 1, at 74 (1985) 1986 U.S.Code Cong. & Admin.News pp. 2835, 2856.

The Court construes CERCLA's liability provisions liberally with a view toward facilitating the statute's broad remedial goals. *Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir.1992); *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 892 (9th Cir.1986).

A. The McColl Site is a Facility under Section 101(9)

Under section 101(9) of CERCLA "facility," as used in CERCLA, includes within its meaning "any . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, . . . or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. . . ." 42 U.S.C. § 9601(9). An area or site is a facility within the meaning of CERCLA if a hazardous substance is placed there or has otherwise come to be located there. *3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1360 (9th Cir.1990), *cert. denied* 500 U.S. 917, 111 S.Ct. 2014, 114 L.Ed.2d 101.

An affidavit attesting to the presence at a site of hazardous substances including toluene and xylene is sufficient to establish that the site is a "facility" for CERCLA purposes. *United States v. Hardage*, 761 F.Supp. 1501 (W.D.Okl.1990).

The waste in the pits is characterized by low pH, high sulfur and high organic content. Among other arguably hazardous substances contained in the waste at the McColl site are benzene, toluene and xylene. Declaration of John

Blevins at 5, Exhibit 10 at 186. It is beyond dispute that at least these three substances are hazardous substances under CERCLA. *See* 40 C.F.R. § 261.33(e)-(g) (1992). The listing of a substance as hazardous, not its concentration or amount, controls the identification of hazardous substances under CERCLA. *City of New York v. Exxon Corp.*, 744 F.Supp. 474 (S.D.N.Y.1990).

Thus, there can be no dispute that the so-called sumps filled with acid sludge on the McColl Site contain hazardous substances and so constitute a facility under section 101(9).

Thus, the Court concludes the McColl Site is a facility for purposes of section 107 liability.

B. Release or Threatened Release of Hazardous Substances at the McColl Site

Arguably, the dumping of the acid sludge into the unlined pits on the McColl Site itself constitutes a release within the meaning of section 101(22). But the Court need not reach that issue. Since at least 1980, when the EPA became involved in the site, the acid sludge—a black, viscous, tar-like material—has been seeping up through the soil cover to the surface. Blevins Declaration at 5, Exhibit 10 at 186; Deposition of John Blevins at 74- 75, 98-101, 102-04, Exhibit 11 at 193-94, 200-03, 204-06; *see also* Exhibit A of Blevins Declaration, Exhibit 10 at 190-91 (color reproductions of photographs showing lava-like flows of the sludge at various places on the McColl site, some quite close to residences). These seeps clearly are releases into the environment, and the fact that they continue to occur presents an ongoing threat of further release of hazardous substances into the environment.

In addition, once the sludge breaks the ground surface benzene, toluene, xylene, and hydrogen sulfide are released into the atmosphere—another release of hazardous substances into the environment.

Finally, there is some evidence that substances in the acid sludge deposited at the McColl Site may have migrated into groundwater 230 feet below the surface. The fact that the sludge was dumped into unlined pits, the shown tendency of the sludge to migrate through strata of soil, and the detection of volatile substances known to be present in the sludge in groundwater are sufficient to establish at least a threatened release of hazardous substances into the groundwater.

In light of this showing, the Court concludes that there is no genuine dispute regarding the fact that releases of hazardous substances from the McColl Site have occurred and a continuing threat of further releases exists.

C. Governments' Costs in Responding to the Release or Threatened Release of Hazardous Substances at the McColl Site

Defendants do not dispute, and the record manifests beyond dispute, that the governments have incurred response costs at the McColl Site within the meaning of section 107(a).

D. Defendants' Status as "Covered Persons" Under Section 107(a)

The record before the Court establishes beyond dispute that the oil companies generated the hazardous waste dumped at the McColl Site, and that they contracted with Eli McColl to transport the waste to, and dump it in the sumps on, the McColl Site. Consequently, the oil companies are properly charged as generators and arrangers under section 107(a)(3), 42 U.S.C. § 9607(a)(3).

In addition, it is undisputed that McAuley is the present owner of a portion of the McColl Site containing much of the hazardous waste. Moreover, McAuley is the operator of a country club with a golf course on that portion of the McColl Site. Thus, McAuley is properly charged as an owner and operator under section 107(a)(1), 42 U.S.C. § 9607(a)(1).

Thus, the Court concludes as to all Defendants there is no genuine issue regarding any of the four elements under section 107(a). However, Defendants have raised a number of defenses to the imposition of liability, and the Court now turns to those defenses not previously stricken.

II. Section 107(b) Defenses

Defendants assert both the act of war defense under section 107(b)(2) and the acts of a third party defense under section 107(b)(3) of CERCLA. With CERCLA's basic remedial purposes in mind, the Court narrowly construes the defenses provided under section 107(b). *New York v. Shore Realty,* 759 F.2d 1032, 1048-49 (2d Cir.1985); *Kelley v. Thomas Solvent Co.*, 727 F.Supp. 1532, 1540 n. 2 (W.D.Mich.1989); *see also Pinhole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F.Supp. 283, 286 (N.D.Cal.1984) (contrasting "extremely limited" defenses under section 107(b) with "extremely broad" scope of liability under section 107(a)). Moreover, "in light of the 'sole cause' limitation," the defenses enumerated in section 107(b) are viewed as extremely restricted. *See* 2 The Law of Hazardous Waste: Management, Cleanup, Liability Litigation § 14.01[8][b] at 14-160.3 (Susan M. Cooke, ed.).

A. Act of War Defense

Section 107(b)(2) of CERCLA provides an exemption from liability for an otherwise liable party where the defendant can establish by a preponderance of the evidence that the release was "caused solely by . . . an act of war." 42 U.S.C. § 9607(b)(2). The oil companies invoke this defense on the ground the federal government's requisitioning of aviation fuel and regulation of the production of aviation fuel's production during World War II constitutes an act of war under section 107(b)(2). The oil companies do not squarely confront the formidable hurdle of the "sole cause"

requirements for all section 107(b) defenses. However, the oil companies maintain they dumped the acid sludge at the McColl Site only because the government required them to produce quantities of aviation fuel so great that they had no alternative means of disposing of the waste produced by the alkylation process.

The Court has found no judicial construction of section 107(b)(2). The term "act of war" is undefined in CERCLA and, though familiar from common usage, does not disclose its parameters on its face. Nor is there any precedent clearly defining the term. Therefore, the Court looks to the structure and purpose of CERCLA, the legislative history, and a decisional law addressing the applicability of the term "act of war" in other contexts. In addition, as the term "act of war" appears to be a term of art borrowed from international law, the Court looks to sources addressing the meaning of "act of war" in that field.

Insofar as CERCLA's overall structure may shed light on the proper construction of the act of war defense, the Court notes that the provisions imposing liability under CERCLA are sweeping in their language and scope, while the provisions exempting parties from liability are narrowly drawn. Compare 42 U.S.C. § 9607(a) (imposing liability) with 42 U.S.C. § 9607(b) (providing three narrow and purportedly exclusive defenses to liability) and 42 U.S.C. § 9601(35)(A)(i) (narrow provision for "innocent landowner" defense added by SARA). This counsels against the expansive construction of "act of war" urged on the Court by the oil companies.

The legislative histories of CERCLA and SARA are devoid of any explanation of what Congress meant by its use of the term "act of war." However, the legislative histories of both CERCLA and SARA indicate beyond any doubt that CERCLA's sponsors intended the scheme of liability under CERCLA to be, in effect, one of strict liability and the

defenses enumerated in section 107(b) to be narrowly construed.[3] Moreover, in amending CERCLA through SARA, Congress expressly endorsed judicial construction of section 107(a) that imposed strict liability. *See* H.Rep. No. 253, Pt. 1 at 74 (quoting with approval *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 810 (S.D.Ohio 1983)), *reprinted in* 1986 U.S.C.C.A.N. pp. 2835, 2856.

On the basis of the legislative history, and with CERCLA's overall slant in favor of imposing liability, one leading commentator has opined that the act of war defense presumes "governmental sponsorship" and "formalization of hostilities," and contemplates "a confrontation of organized forces, acts of state, massive violence, and overwhelming influence that are unlikely to be found in the domestic Superfund context." 4 William H. Rodgers, Jr., Environmental Law: Hazardous Wastes and Substances § 8.13(C)(3)(c) (1992) (pointing to "the environmental terrorism inflicted on the air and water of the Persian Gulf by the troops of Saddam Hussein" as an archetypal example). Another commentator takes the not dissimilar view that the "act of war" defense contemplates "man-made catastrophes beyond the control of any responsible party." 2 The Law of Hazardous Waste: Management, Cleanup, Liability Litigation § 14.01[8][b] at 14-160.3 (Susan M. Cooke, ed.).

---

[3] Cong.Rec.—House H11787, Dec. 3, 1980 (remarks of Rep. Florio) ("The standard of liability . . . is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act; that is strict liability."), reprinted in 2 Superfund: A Legislative History 168 (Helen Cohn Needham, ed. 1984); id. at 11788 (view of Dept. of Justice expressed in letter to Rep. Florio) ("Caselaw construing section 311 clearly indicates that not only are the defenses to be narrowly construed but the plain meaning of the regime establishes a strict liability standard."), reprinted in Superfund, supra at 169; S.Rep. No. 848, 96th Cong., 2d Sess. 13, reprinted in 2 Superfund, supra at 483; H.Rep. No. 1016, 96th Cong., 2d Sess. 33, reprinted in 1980 U.S.C.C.A.N. pp. 6119, 6136; H.Rep. No. 253, Pt. 1 at 74 (SARA) ("liability under CERCLA is strict, that is, without regard to fault or willfulness").

As noted above, the Court has been unable to uncover any judicial precedent defining the term "act of war" either in the CERCLA context or that of environmental law generally. Even looking beyond the realm of environmental law, decisional law provides no clear authoritative definition of the term "act of war." Recent caselaw evidences a habit of merely using the term as a conclusory label. *E.g., Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir.1992) (shooting down of Iranian passenger jet by United States constituted an act of war); *Agee v. Muskie*, 629 F.2d 80, 97 n. 12, 115 (D.C. Cir.1980) (MacKinnon, J., dissenting) (seizure by Iranians of United States embassy in Tehran characterized as an act of war).

Both the governments and Defendants reach farther back, claiming support for their respective interpretations of "act of war" from the decision in *Farberwerke Vormals Meister Lucius Bruning v. Chemical Foundation, Inc.*, 283 U.S. 152, 51 S.Ct. 403, 75 L.Ed. 919 (1931). *Farberwerke* concerned the seizure during World War I of patents belonging to supporters of Germany pursuant to the Trading With the Enemy Act, 40 Stat. 411, 420, 421, 459, 460, 1020, 1021, 50 U.S.C.A. Appendix §§ 7(c), 10(f), 12. Under *Farberwerke*, it is clear that the seizure of property from supporters of an enemy nation in time of war, for the purpose of weakening that enemy, constitutes an act of war. 283 U.S. at 160-62. The Court finds little guidance in *Farberwerke*, however, regarding the applicability of the term "act of war" to the federal government's requisition of aviation fuel and close regulation of fuel production during World War II.

Fortunately, earlier decisional law provides more guidance as to the proper construction of "act of war" in this case. First, the Court notes that the seizure or capture of property belonging to or benefitting an enemy nation has been authoritatively distinguished from situations in which there is some element of contractual relationship—i.e., an express or

implied agreement to compensate the owner—in the government's use or possession of property. *See, e.g., Juragua Iron Co. v. United States*, 212 U.S. 297, 308, 29 S.Ct. 385, 389, 53 L.Ed. 520 (1909) (no act of war where agreement to pay for use of property may be implied); *United States v. Winchester & Potomac River Co.,* 163 U.S. 244, 255, 16 S.Ct. 993, 997, 41 L.Ed. 145 (1896) (distinguishing seizure with no implication of compensation of railroad used for benefit of Confederacy, which constituted an "act of war," from situation where property is taken or used by federal government under an implied agreement that owner should be compensated).

In this case, of course, the federal government's procurement of aviation fuel occurred through express contracts. This undermines Defendants' effort to characterize the federal government's close regulation of the oil companies' production of aviation fuel as an "act of war."

Another helpful line of decisional law arose in the wake of the Civil War as a consequence of the court of claims' delineation of acts of war for which the federal government could not be held liable under the Bowman Act, ch. 116, 22 Stat. 485 (Mar. 3, 1883). The court consistently distinguished cases in which the government appropriated property in order to supply the military, which were compensable, from cases in which the government seized or destroyed property for the purpose of injuring or weakening the enemy. *See, e.g., White v. United States*, 33 Ct.Cl. 368, 375, 1800 WL 2081, (1898) (distinguishing between appropriation of stores and supplies for the use of the military from the "destruction of property as an act of war"); *Conard and Twenty Others v. United States*, 25 Ct.Cl. 433, 436-37, 1800 WL 1869 (1890) (taking of property properly characterized as act of war where primary purpose was not to supply the military, but rather to injure enemy); *Beasely v. United States,* 21 Ct.Cl. 225, 227, 1800 WL 1484 (1886). In this case, there can be no question but

that the federal government's primary purpose in acquiring and regulating production of aviation fuel from the oil companies was to supply the military.

Lastly, the Court observes that the term "act of war," while nowhere clearly defined in American law, appears to be borrowed from international law. In the realm of international law, the term is defined clearly as a "use of force or other action by one state against another" which "[t]he state acted against recognizes . . . as an act of war, either by use of retaliatory force or a declaration of war." James R. Fox, Dictionary of International and Comparative Law 6 (1992); Union Académique Internationale, Dictionnaire de la Terminologie du Droit Internationale 12-13 (1960).

None of these guides to the proper interpretation of "act of war" as used in section 107(b)(2) of CERCLA supports the novel, expansive construction urged by Defendants. While the Court recognizes that the federal government's regulation of the production of aviation fuel during World War II was exceptionally far reaching, the Court concludes the term "act of war" as used in section 107(b)(2) of CERCLA cannot reasonably be construed to cover either the government's wartime contracts to purchase aviation fuel from the oil companies or its regulation of the oil companies' production of aviation fuel. Thus, Defendants' invocation of the act of war defense to section 107(a) liability must fail.

B. Acts of a Third Party

The oil companies claim the United States, Japanese, and German governments are third parties who bear sole responsibility for the presence of the hazardous waste at the McColl Site. This claim must fail. "[S]ection 107(b)(3) provides a defense to liability only where a totally unrelated third party is the sole cause of the release or threatened release of a hazardous substance." *United States v. Stringfellow,* 661 F.Supp. 1053, 1061 (C.D.Cal.1987).

As noted above the oil companies entered into volitional contracts with the United States for the sale of aviation fuel. It was within the context of this contractual relationship with the United States that the oil companies arranged to have the waste disposed of at the McColl Site. Section 107(b)(3) expressly precludes invocation of the third party defense in such a scenario.

Therefore, Defendants' endeavor to invoke the third party defense under CERCLA section 107(b)(3) must fail as a matter of law.

III. Innocent Landowner Defense

Although undeniably the present owner of part of the McColl Site, McAuley attempts to assert the so-called "innocent landowner" defense under section 101(35) of CERCLA.

Originally, CERCLA imposed strict liability on all owners of contaminated property regardless of the circumstances of their ownership. This aspect of section 107(a) became controversial as a result of several cases in which apparently "innocent" landowners were held liable for response costs greatly in excess of the value of the land. *E.g., United States v. Maryland Bank & Trust Co.,* 632 F.Supp. 573 (D.Md.1986). In response to this controversy, Congress introduced a so-called "innocent landowner" defense to liability in SARA. Congress created this new exception by modifying the definition of "contractual relationship" in section 101(35), 42 U.S.C. § 9601(35). Amended section 101(35) excepts from the term "contractual relationship" a landowner defendant who shows by a preponderance of the evidence that "[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." 42 U.S.C. § 9601(35)(A)(i).

Congress was careful, however, to ensure that the innocent landowner exception is narrow. Thus, section 101(35)(B) requires: "To establish that the defendant had no reason to know . . . , the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35)(B). Furthermore, in evaluating whether a defendant has fulfilled this requirement, the Court is directed to "take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection." *Id.*

In order to establish its entitlement to exemption from liability under the innocent landowner exception, McAuley must establish the following four elements:

> (1) "[a]t the time [McAuley] acquired the facility [McAuley] did not know and had no reason to know" that the property was contaminated, 42 U.S.C.A. § 9601(35)(A)(i);
>
> (2) no hazardous substances were disposed of on the property during McAuley's ownership of the site, 42 U.S.C. § 9601(35)(A);
>
> (3) McAuley exercised "due care with respect to the hazardous substances" once it acquired the property, 42 U.S.C. § 9607(b)(3)(a); and
>
> (4) McAuley" by any act or omission, [did not] cause[ ] or contribute[ ] to the release or threat [of] release of a[ny] hazardous substance" on the site, 42 U.S.C. § 9601(35)(D).

Consistent with the general rule that defenses to CERCLA are narrowly construed, these criteria are strictly construed and failure to carry its burden with regard to any one of them will defeat a defendant's attempt to assert the innocent landowner defense. *CPC International, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 581 (W.D.Mich.1991); *Washington v. Time Oil Co.*, 687 F.Supp. 529, 531 (W.D. Wash.1988).

Here, there is overwhelming evidence that not only did McAuley have ample reason to know of the presence of hazardous wastes at the country club, it had actual knowledge of that fact prior to its purchase of the club. The only "evidence" to the contrary is the bald assertion in Mr. McAuley's declaration that he did not know and had no reason to know that there was hazardous waste at the McColl Site. This declaration is patently incredible, as McAuley commissioned an environmental assessment of the Site in 1980. Moreover, prior to making this declaration, Mr. McAuley testified at his deposition that he either had no recollection concerning the environmental assessment he commissioned or was not present during the fall of 1980. Pursuant to *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir.1975), Mr. McAuley's subsequent contradictory declaration is entitled to no consideration.

Because McAuley fails to satisfy the exacting standard set forth in section 101(35)(B), 42 U.S.C. § 9601(35)(B), it fails completely to establish any genuine issue as to the first element of the innocent landowner defense. Thus, the Court concludes that McAuley's invocation of the innocent landowner defense must fail.

III. Assaults on the Constitutionality of CERCLA

Defendants attack the application of CERCLA section 107(a) in this case as violative of both the Due Process Clause and the Takings Clause of the Fifth Amendment. Neither of these claims has merit.

A. Retroactive Application of CERCLA

The oil companies argue that retroactive application of CERCLA in this case would violate the Due Process Clause of the Fifth Amendment. The Court disagrees. Retroactive application of CERCLA has uniformly been held not to violate the Due Process Clause. *E.g., United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir.1988); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732-34 (8th Cir.1986), *cert. denied* 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *United States v. Atlas Minerals & Chemicals, Inc.*, 797 F.Supp. 411 (E.D.Pa.1992); *United States v. Dickerson*, 640 F.Supp. 448, 451 (D.Md. 1986) ("The courts have consistently ruled that CERCLA's language and legislative history overrule the presumption against retroactive application of statutes, and have rejected similar constitutional attacks upon the Act.").

The Court finds no basis on which to distinguish this case from the broad spectrum of others in which retroactive application of CERCLA has been upheld. Indeed, much of the decisional law regarding CERCLA involves the disposal of hazardous wastes that occurred decades before the statute was enacted. Both CERCLA's language and legislative history reveal Congress' conscious intent to compel correction of the careless disposal of hazardous waste in the past by the nation's industries. *NEPACCO*, 810 F.2d at 732-33 (noting past tense of § 107's language referring to actions and conditions); *United States v. Kramer*, 757 F.Supp. 397, 430 (D.N.J.1991).

Therefore, the Court concludes retroactive application of CERCLA in this case does not violate the Due Process Clause of the Fifth Amendment.

B. Application of CERCLA as an Unconstitutional Taking

Defendants contend imposition of section 107(a) liability in this case constitutes an unconstitutional taking. This attack

on government cost recovery actions under section 107 has been raised and rejected by courts. *E.g., NEPACCO,* 810 F.2d 726, 734 (8th Cir.1986). CERCLA, as amended by SARA, clearly provides a mechanism by which parties held liable for response costs under section 107(a) may allocate those costs among themselves through contribution suits under section 113(f), codified as amended at 42 U.S.C. § 9613(f). *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*, 669 F.Supp. 1285, 1295 (E.D.Pa.1987).

In view of the statutorily provided right of contribution, CERCLA's provision for allocating liability for the cleanup of public hazards cannot fairly be characterized as a taking at all. Thus, the Court concludes that the imposition of section 107 liability on the defendants in this action does not constitute an unconstitutional taking.

IV. Bifurcation of Defendants' Counterclaims and Cross-Claims

Federal Rule of Civil Procedure 42(b) authorizes the Court to order a separate trial of any claim including counterclaims, cross-claims, or any other issue for purposes of convenience, avoiding prejudice, expedition, or judicial economy. The principal goal of Rule 42(b) is to promote efficient judicial administration, and only one of the conditions set forth in the rule need be served to justify a separate trial.

Under CERCLA, the governments may recover response costs that are necessary and consistent with the National Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(B). Thus, all that remains to the cost recovery phase of this litigation is the Court's determination whether the governments' response costs are consistent with the NCP.

Defendants assert numerous counterclaims against the United States, including several which assert that the United States is liable under § 107 of CERCLA due to the alleged

control the United States exercised over the petroleum industry during World War II. The oil companies also seek recovery of $12 million in response costs they claim to have incurred in connection with the contamination of the McColl Site. In addition, Defendants have filed cross-claims against each other.

The bringing of such claims and actions in pursuit of contribution is expressly provided for in section 113(f) of CERCLA. 42 U.S.C. § 9613(f). The purpose of section 113(f) is to mitigate the harshness of section 107 by providing for an eventual equitable sharing of costs among responsible parties. However, it was not intended and the Court will not allow it to be used as a tool to delay the securing of CERCLA's benefits to society.

CERCLA clearly provides that cost recovery can be sought before any counterclaims are resolved. And the legislative history of CERCLA indicates that Congress intended for the government to be entitled to recover its costs prior to the resolution of any counterclaims or cross-claims for contribution. ("The Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private contribution actions".) *E.g.*, 132 Cong.Rec. S14,903 (daily ed. Oct. 3, 1986).

The possibility of a future finding of partial liability on the part of the governments ought not stand as a bar to expeditious recovery of response costs, as Defendants will be reimbursed in the event the governments are found liable. *U.S. v. Western Processing Company*, 734 F.Supp. 930, 939-40 (W.D.Wash.1990). The Court is of the opinion that allowing the governments to recover their response costs before resolving Defendants' counterclaims and cross-claims will not unduly prejudice Defendants as they will be reimbursed in the future for any costs paid to the Superfund that are properly attributable to other parties. In contrast, the

Court takes the view that litigating the cost recovery together with the cross and counterclaim aspects of the action would inappropriately prejudice the public welfare by slowing replenishment of the Superfund.

Therefore, the Court concludes that bifurcation of Defendants' counterclaims and cross-claims from the remaining portion of the cost recovery phase of this litigation will best serve the Court's and litigants' economy of time and effort.

CONCLUSION

Wherefore, the Court hereby ORDERS:

1. Because the oil companies have failed to raise any genuine issue of material fact as to their liability, summary judgment as to the liability of the oil companies under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), is GRANTED in favor of Plaintiffs United States of America and the State of California and against Defendants Shell Oil Company, Union Oil Company of California, Atlantic Richfield Company, and Texaco, Inc.; and

2. Because McAuley has failed to raise any genuine issue of material fact as to its liability under 42 U.S.C. § 9607(a), the governments' motion for summary judgment as to liability of McAuley is GRANTED in favor of Plaintiffs United States of America and the State of California and against McAuley LCX Corporation; and

3. Having granted summary judgment against all remaining defendants as to liability under section 107(a) and finding the purposes of CERCLA best served by separating the remaining aspects of the cost recovery phase of the action from Defendants' numerous counterclaims and cross-claims for contribution, the Court ORDERS Defendants' counterclaims and cross-claims bifurcated from the remainder of the cost recovery phase; and

4. Litigation of Defendants' counterclaims and cross-claims for contribution is stayed pending completion of the governments' cost recovery phase of this action.

The Clerk shall send, by United States mail, copies of this Memorandum of Decision and Order to all parties to this action.

IT IS SO ORDERED.

JUDGMENT

For the reasons set forth in the Memorandum and Decision and Order filed contemporaneously herewith,

IT IS HEREBY ORDERED AND ADJUDGED:

Judgment shall be entered in favor of Plaintiffs United States of America and the State of California and against Defendants Shell Oil Company, Union Oil Company of California, Atlantic Richfield Company, Texaco, Inc., and McAuley LCX Corporation on the issue of liability under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a).

The Clerk shall send, by United States mail, copies of this Judgment to all parties to this action.

APPENDIX G

42 U.S.C. § 9607. Liability.

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

* * * *

(Pub.L. 96-510, Title I, § 107, Dec. 11, 1980, 94 Stat. 2781; Pub-L. 99-499, Title 1, §§ 107(a) to (d)(2), (e), (f), 127(b), (e), Title II, §§ 201, 207(c), Oct. 17, 1986, 100 Stat. 1628 to 1630, 1692, 1693, 1705; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub-L. 103-429, § 7(e)(2), Oct. 31, 1994, 108 Stat. 4390; Pub.L. 104-208, Div. A, Title II, § 2502(a), Sept. 30, 1996, 110 Stat. 3009-462; Pub.L. 104-287, § 6(j)(2), Oct. 11, 1996, 110 Stat. 3400; Pub.L. 107-118, Title I, § 102(a), Title II, §§ 221, 222(b), Jan. 11, 2002, 115 Stat. 2356, 2368, 2371.)

APPENDIX H

UNITED DISTRICT DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. Civ. 91 0589

RJK (Ex)

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

SHELL OIL COMPANY, et al.,
Defendants.

AND RELATED ACTIONS

STIPULATED FACTS OF THE PARTIES RELATING TO PENDING MOTIONS FOR SUMMARY JUDGMENT AND RELATED MOTIONS

Date: [No Hearing]
Time: [None]
Ctrm: Honorable Robert J. Kelleher

. . .

4. During World War II, the most critically needed refinery product was 100 octane aviation gasoline, often referred to herein as "avgas." [co13]

. . .

8. To meet avgas requirements, the refineries would blend several different elements: the first element was aviation base stock—generally 40% to 50% of avgas: at the start of the war, this was similar to a normal motor gasoline with an octane rating of 72 to 75. [co17]

9. A second avgas element was alkylate—generally 25% to 40% of avgas: This was produced by a process called alkylation which involved combining molecules of lighter weight petroleum fractions to produce iso-octanes. The most efficient process was to mix iso- butane with butylene in the presence of 98% sulfuric acid. Butylene and iso-butane each had four carbon atoms and would combine to make iso-octane, which had eight carbon atoms. Because of the presence of other hydrocarbons, alklate had an octane rating of 92 to 94. [co18]

. . .

51. The WPB's power included the authority to

> "increase, accelerate, and regulate the production and supply of materials, articles and equipment . . . required for national defense [and to] formulate plans for the mobilization for defense of the production facilities of the Nation, and to take all lawful action necessary to carry out such plans." [us221]

52. The WPB's task was principally accomplished through use of a nationwide priority rankings system, under which the WPB reviewed requirements for goods appearing to be scarce, determined how much of each such product or raw material was needed, and identified facilities to help meet this demand. [us222]

53. The WPB acted primarily through the allocation of scarce materials and equipment under an intricate system of priorities. [co9]

54. The WPB exercised authority (delegated from the President) under several wartime statutes. [us223]

55. The Priorities and Allocations Act of 1940 ("Priorities Act"], as amended, required facilities to give priority to military contracts and authorized the President to regulate the flow of scarce raw materials where the use of such materials for national defense resulted in a supply shortage. [us224]

56. The Second War Powers Act, passed in March 1942, authorized the WPB to allocate not just "materials" deemed to be in scarce supply, but "facilities" as well. [us225]

57. The Second War Powers Act enabled the WPB to require a company to produce a good needed for the war effort where it was within the company's physical and technical capacity to do so. [us226]

58. Presidential powers under the Second War Powers Act were delegated to the Chairman of the War Production Board in April 1942. [us227]

59. The Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885, 892 (1940), .and the Second War Powers Act authorized the United States to required companies to produce goods needed for war where it was within a company's physical and technical capacity to do so, and such requirements were backed by civil and criminal penalties and the possibility of seizure. [co11]

. . .

168. The cost estimates used to arrive at a negotiated price for the avgas contracts with DSC permitted an estimated profit between 6 and 7 percent. [us104]

. . .

175. The first wartime facilities built by Richfield for the manufacture of 100 octane gasoline at Wilmington were completed in February 1943. [us25]

176. Richfield's expanded facilities were financed through 75% loans from the Defense Supplies Corporation, through advances repayable by deliveries of gasoline over a three year period. [us26]

177. Richfield entered into another contract with the DSC in March 1943, to further expand its refining facilities, including the construction of catalytic cracking units. [us27]

178. Union, on its own initiative, submitted a detailed proposal to the OPC in January 1942 to design and construct expanded facilities to produce 100 octane gasoline "upon assignment of adequate priority ratings." [us93]

. . .

199. On December 30, 1942, the DSC informed refiners that for purposes of DSC contracts with refiners, they "may rely upon instructions transmitted by the Petroleum Administration for war in matters relating to production and blending of gasoline or components thereof, as well as specifications," to which such gasoline is manufactured. With respect to PAW requests to shift components among refiners, the DSC stated that any contractual provisions with DSC were considered waived if and where compliance with the PAW's requests interfered with the company's performance of its contract with the DSC. [co78]

. . .

200. Once a refinery had the capacity to make 100 octane aviation gasoline, the government had the authority pursuant to the Second War Powers Act to compel the refinery to maximize its existing capacity to produce priority products, including aviation gasoline. [co53]

201. During the War, the government was prepared to exercise its authority under the Second War Powers Act to assure continued production of avgas from existing facilities, including seizure of a facility. [co541

. . .

221. Starting at least as early as February 1943, the PAW sent each refinery involved in the high octane program a statement of the planned blending requirements for each refinery for a three month period, which statement was updated monthly. It identified the blending components the refinery would receive from other sources and where it was to

ship its own excess components. A January 1, 1945, PAW Report on Production and Blending states that: "Upon receipt, the [planned blending] data, in some cases revised by wire or telephone conversation, are transferred to the Planned Blending Sheets. In most cases, the blend indicated by the refiner is copied as received; in others, it is revised in accordance with standard operating procedure of transferring components so as to produce maximum aviation gasoline nationwide." Under the planned blending program, letters were sent to each high octane refiner, which recommended the blending of components for each of the three months covered by the sheet, and authorized the purchase or sale of components indicated for the third or last month. (co82)

. . .

228. Authority for the blending program began with Recommendations 8 and 16, see *supra*, and later was placed under PAW Petroleum Directive 77, issued on July 24, 1944. PAW Directive 77 stated:

> "The Petroleum Administration for War controls all transfers within the petroleum industry of aviation-grade base stock, blending agents, and high-octane aviation fuel. The Petroleum Administration for War instructs industry with respect to specifications for the types and grades of high-octane aviation fuel which shall be manufactured or blended in regular commercial production." [co85]

. . .

319. The impact of contracts between the government and oil companies nationwide which contemplated the construction of avgas facilities and the government purchase of avgas, plus allocation and blending programs of the OPC and PAW and government purchases and sale of intermediate products was to dramatically increase the production of avgas during the war. Production of aviation gasoline increased from 40,000

barrels a day in December 1941 to 514,000 barrels a day in 1945, a twelve-fold increase. [co103]

. . .

321. Because of other uses of acid in the refinery and less efficient use of acid in alkylation at the start of the war, the actual growth of acid use was not as dramatic as the increase in aviation gasoline production. According to the Shell operating reports for its Los Angeles refineries, annual acid use went from 24 million pounds in 1941 to 120 million pounds at the peak in 1944, a five fold increase. [co1051

. . .

323. The Oil Companies' Southern California refineries generated two general types of sulfuric acid by-products during the war: "spent alkylation acid" and "acid sludge." Spent alkylation acid was 87% to 90% sulfuric acid by weight and could be reused and recycled within the refineries up to the limit of other processes that could use spent alkylation, acid. [us299]

324. Acid sludge was different. It contained only 45% to 65% unreacted and reacted sulfuric acid by weight, and generally could not be put to further use within the refineries. [us300]

325. In 1941, 85% of the fresh sulfuric acid going into the Shell Los Angeles refineries was used for alkylation, a figure that reached 91% in 1944. Depending on the year, some or all of the spent alkylation acid was reused within the refinery to treat other products, including motor gasoline, kerosene, lubricating oil, and aviation gasoline components. [co107]

. . .

329. Fresh sulfuric acid was in short supply in California from the end of 1943 through the end of the war. Refinery spent alkylation acid could be a valuable commodity since, for many industrial processes, spent alkylation acid could substitute for fresh acid, thereby freeing up fresh acid for use

in alkylation. For example, spent sulfuric acid could be used to treat other refinery products, to manufacture ammonium sulfate and superphosphates and to pickle steel. Sulfuric acid sludge could be used in the manufacture of ammonium sulfate although the demands were small. Spent alkylation acid and acid sludge could also be regenerated into fresh acid. However, acid sludge was much more difficult to regenerate than spent alkylation acid. [co111]

. . .

365. As stated in the October 13, 1944 Summary of Meeting of the Inorganic Acids Committee regarding a proposed sulfuric acid reclamation plant in Texas:

> "One of the committee members said that when his company built a similar regeneration plant in California, it took a year to complete the project. Another said that type of plant is highly complicated in comparison with a sulphuric acid plant.
>
> The committee recommended that, since the proposed regeneration plant would be tying up strategic materials and equipment needed by the proposed sulphuric acid plants for direct war production, the case be deferred until the proposed sulphuric acid plant are completed."

The California committee member was Henry Stauffer and was presumably referring to the Dominguez No. #2 plant. [co142]

. . .

379. The WPB declined to authorize priorities during the war for acid regeneration plants in California only on two occasions. The first occasion involved a Texaco proposal to build a 52-ton-per-day acid reprocessing plant to reprocess spent alkylation acid and acid sludge from Texaco's planned refinery expansion. Texaco anticipated reprocessing about 40 tons per day of spent alkylation acid and 12 to 14 tons per day of acid sludge. [us337]

. . .

402. Report 8 concerning the Union and Shell Los Angeles refineries noted that their acid sludge in the month of December was being dumped. The Union report noted in particular that "will ship to Shell Chemical soon as cars available." Richard Smith testified that this report indicated that the immediate cause of Union's dumping was a shortage of tank cars. [co116.1]

. . .

405. Although tank cars were sometimes in short supply during World War II, Richard Smith knew of only one or two instances in which a shortage contributed to dumping of acid sludge that might otherwise have been taken elsewhere. [us298]

. . .

409. Shell's Wilmington/Dominguez refinery operating reports specify the quantities of acid sludge burned or otherwise disposed of in the years immediately preceding the war:

1939: 47,000 barrels burned, 1,000 barrels "disposed of by Gray Trucking Company"

1940: 9,500 barrels burned, 34,000 barrels "disposed of by Gray Trucking Company"

1941: 0 barrels burned, 92,000 barrels "to disposal" [us309]

410. Shell continued to dump acid sludge from its Wilmington/Dominguez refinery during the war. Shell's operating reports specify the quantities of acid sludge burned or disposed of during the war:

1942: 0 barrels burned, 100,000 barrels "to disposal"

1943: 0 barrels burned, 112,000 barrels "to disposal"

1944: 0 barrels burned, 66,000 barrels "to disposal"

1945: 4,500 barrels burned, 1,000 barrels "to disposal"

This Court has previously found that the acid sludge sent "to disposal" was dumped at the McColl Site. [us310]

411. The primary reuse to which acid sludge could be put was making ammonium sulfate fertilizer at a Shell Chemical plant. [us312]

. . .

501. During the early part of World War II, some of Union's acid sludge from its Wilmington refinery was reprocessed by General Chemical Company. [us499]

502. In the early 1930s Shell often destroyed acid sludge in special sludge burners. [us500]

503. One Shell memorandum noted in 1939:

> "At Dominguez this [burning] is now being done at considerable expense, but what is perhaps more important—it is creating a menace through the discharge of large amounts of sulfur dioxide."

[us500.1]

. . .

508. At the start of the war, the Texas Company Los Angeles refinery burned all of its acid sludge. [cc74]

509. Texas Company (now Texaco) was burning acid sludge in 1943 at its Wilmington refinery. [us508]

. . .

511. When Texas put in the catalytic cracker, it increased the amount of acid sludge it had to handle. Until the expansion, all the acid sludge produced could be handled by burning. However, the expansion, besides increasing the amount of sludge also produced hydrogen sulfide from the catalytic cracker. Since this was lethal, it got priority in burning in the boiler. Although there was some boiler capacity increase. increased burning of sludge was limited by the amount of

fumes the refinery could put out with its impact on the community and the Pacific Coast Highway that went through the middle of the refinery. [cc77]

. . .

602. In determining the cost of avgas from DPC plants, capital charges were not included in the unit costs on the theory that the Government had already made the investment in the facilities. In determining the price per gallon of avgas the Los Angeles refineries of Union, Texas, and Richfield included a facilities charge for depreciation, amortization and obsolescence of 1.8 cents, 0.56 cents, and 1.09 cents respectively; no information is available on the Shell Wilmington refinery contracts. [cc33]

603. A PAW report dated June 1, 1945, analyzes the impact of the end of the war in Europe. Up until that time, the military requirements were always higher than the available productive capacity. The report indicates that with the European war over, there was the prospect of a surplus. The issue was whether to keep up the maximum production and put it in a strategic reserve under existing policy or to review and change the policy. The conclusion of the report was that the policy to accumulate the surplus in a strategic reserve should be rescinded. The last 3,000 barrels of the estimated production of 512,000 a day in June 1945 used very expensive codimer and cost the military 42 cents a gallon. The next 6,500 barrels of codimer and expensive base stocks cost 22 cents a gallon. [cc34]

APPENDIX I

CIRCUIT COURT OPINIONS DECIDING GOVERNMENT ARRANGER LIABILITY UNDER CERCLA

FMC Corp. v. *United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (affirming without opinion a district court decision finding United States liable as arranger; case involved manufacture of high tenacity rayon during World War II; approximate cleanup costs: up to $300 million).

United States v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (held United States not liable as arranger because of insufficient control over facility operations and arrangement for disposal of waste; case involved Vietnam War era Agent Orange manufacturing; approximate cleanup costs: over $100 million).

United States v. *Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) (reversing a district court decision finding United States liable as arranger on grounds that United States did not own raw materials and did not directly arrange for disposal of hazardous waste; case involved aviation gasoline manufacture during World War II; approximate cleanup costs: $95 million).

DISTRICT COURT OPINIONS DECIDING GOVERNMENT ARRANGER LIABILITY UNDER CERCLA

FMC Corp. v. *United States Dep't of Commerce*, 786 F.Supp. 471 (E.D. Pa. 1992) (held United States liable as arranger; same case as Third Circuit opinion at 29 F.3d 833 described above).

United States v. *Shell Oil Co.*, No. CV 91-0589-RJK (C.D. Cal. Sept. 18, 1995) (held United States liable as arranger in unreported opinion filed on September 18, 1995; same case as Ninth Circuit opinion at 294 F.3d 1045 described above).

Maxus Energy v. *United States*, 898 F.Supp. 399 (N.D. Tex. 1995) (held United States not liable as arranger because it was not the owner of raw materials; case involved Vietnam War era Agent Orange manufacturing; approximate cleanup costs: $31.5 million).

Elf Atochem N. Am. v. *United States*, 914 F.Supp. 1166 (E.D. Pa. 1996) (held United States not liable as arranger because it did not supply raw materials; case involved manufacture of poison gas under contract during World War II; approximate cleanup costs: unknown).

East Bay Mun. Util. Dist. v. *United States Dep't of Commerce*, 948 F.Supp. 78 (D.D.C. 1996) (held United States not liable as arranger after finding no nexus between United States and disposal of waste because United States assumed no obligation to dispose of waste; case involved zinc mining during World War II; approximate cleanup costs: $14 million).

SETTLED CASES, GOVERNMENT ARRANGER LIABILITY UNDER CERCLA NOT DETERMINED

Mead Corp. v. *United States*, No. 2:92-CV00326 (S.D. Ohio filed Apr. 10, 1992) (settled; summary judgment denied to United States in opinion filed January 27, 1995 on issue of United States arranger liability because court determined a jury could find that United States's control of plant's operations evinced an arrangement for disposal; case involved facility that manufactured munitions for United States Navy during World War II; approximate cleanup costs: unknown).

United States v. *Hooker Chem. Co.*, No. 79-CV990 (W.D.N.Y. filed Dec. 20, 1979) (settled; United States arranger liability not determined; case involved chemical manufacturing and disposal of hazardous wastes at Love Canal; approximate cleanup costs: over $225 million).

Idaho v. *M.A. Hanna Mining Co.*, 83-CV-4179 (D. Idaho filed Dec. 12, 1983) (settled; United States arranger liability not determined; case involved cobalt mining during World War II; approximate cleanup costs: $26 million).

United States v. *Publicker Indus. Inc.*, No. 90-CV-7984 (E.D. Pa. Filed Dec. 19, 1990) (settled; United States arranger liability not determined; case involved industrial alcohol manufacturing facility in operation during World War II; approximate cleanup costs: $20 million).

United States v. *Federal Pac. Elec.*, No. 92-CV-7984 (D. Mass. filed August 7, 1992) (settled; United States arranger liability not determined; case involved electrical capacitor manufacturing facilities in operation during World War II; approximate cleanup costs: $21 million).

PENDING CASES INVOLVING CLAIMS OF GOVERNMENT ARRANGER LIABILITY UNDER CERCLA

United States v. *Atlantic Richfield Co.*, No. CV-89-039-BU-PGH (D. Mont. filed June 23, 1989) (pending; no decision involving United States arranger liability; case involves copper mining during World War II; estimated potential cleanup costs: over $400 million).

55 Motor Ave. Co. v. Liberty Indus. Finishing Corp., No. 91-CV-968 (E.D.N.Y. filed Mar. 19, 1991) (pending; draft consent decrees have been prepared; no decision involving United States arranger liability; case involves aircraft parts manufacturing facility run by United States during World War II; estimated potential cleanup costs: $29 million).

United States v. *Asarco Inc.*, Nos. 96-0122-N-EJL, 91-0342-N-EJL (D. Idaho filed Mar. 22, 1996 and July 31, 1991) (pending; no decision involving United States arranger liability; case involves lead and zinc mining during World War II; estimated potential cleanup costs: over $350 million).

Hudson Riverkeeper Fund, Inc. v. *Atlantic Richfield Co.*, No. 94 Civ. 2741 (WCC) (S.D.N.Y. filed Apr. 15, 1994) (pending; no decision involving United States arranger liability; case involves the manufacture of PCB-insulated wire cable for the United States Navy during World War II; estimated potential cleanup costs: $100 million).

E.I. Du Pont de Nemours & Co. v. *United States*, No. 97-497 (JCL) (D.N.J. filed Jan. 29, 1997) (pending; no decision involving United States arranger liability; case involves chemical manufacturing during World War I and World War II; estimated potential cleanup costs: at least $110 million).

TDY Holdings LLC v. *United States*, No. 00-CV-6545 (E.D.N.Y. filed Nov. 1, 2000) (pending; no decision involving United States arranger liability; case involves tungsten processing during World War II; estimated potential cleanup costs: $28 million).

Miami-Dade Co. v. *United States*, No. 01-1930 (S.D. Fla. filed May 11, 2001) (pending; no decision involving United States arranger liability; case involves United States activities related to Miami International Airport during World War II, the Korean War, the Vietnam War, and the Cold War; estimated potential cleanup costs: over $465 million).

General Motors Corp. v. *United States*, No. 01-CV-2201 (DMC) (D.N.J. filed May 7, 2001) (pending; no decision involving United States arranger liability; case involves manufacturing of aircraft, aircraft engines, and tanks during World War II, the Korean War, and the Vietnam War; estimated potential cleanup costs: unknown).

DEC 2 2002

Nos. 02-500 and 02-506

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SHELL OIL COMPANY AND UNION OIL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
DAVID C. SHILTON
TODD S. KIM
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the United States "arranged for disposal" of waste within the meaning of Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a)(3), by virtue of its World War II regulation of the manufacture and purchase of a petroleum product when it did not direct or control the actual disposal of waste from that manufacture.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	15
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Amcast Indus. Corp. v. *Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994)	19
Cadillac Fairview/Cal., Inc. v. *United States*, 41 F.3d 562 (9th Cir. 1994)	16
Concrete Sales & Servs., Inc. v. *Blue Bird Body Co.*, 211 F.3d 1333 (11th Cir. 2000)	23
East Bay Mun. Util. Dist. v. *United States Dep't of Commerce*, 142 F.3d 479 (D.C. Cir. 1998)	27
FMC Corp. v. *United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994)	24, 25
Florida Power & Light Co. v. *Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990)	16
General Elec. Co. v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992)	20, 22, 23
Geraghty & Miller, Inc. v. *Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000)	23
Maxus Energy Corp. v. *United States*, 898 F. Supp. 399 (N.D. Tex. 1995), aff'd, 95 F.3d 1148 (5th Cir. 1996)	27
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989)	3
Redwing Carriers, Inc. v. *Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996)	19

Cases—Continued: Page

South Fla. Water Mgmt. Dist. v. *Montalvo*, 84 F.3d 402 (11th Cir. 1996) 23
United States v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) 16, 21
United States v. *Bestfoods*, 524 U.S. 51 (1998) 25, 26
United States v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227 (6th Cir. 1996) 18-19
United States v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995) 14, 20, 27
United States v. *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) 14
United States v. *TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995), cert. denied, 519 U.S. 808 (1996) 22, 24
United States v. *Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir.), cert. denied, 515 U.S. 1158 (1995) 20, 27
Washington v. *United States*, 930 F. Supp. 474 (W.D. Wash. 1996) 27

Statutes and rule:

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*:
§ 106, 42 U.S.C. 9606 12
§ 107, 42 U.S.C. 9607 2
§ 107(a), 42 U.S.C. 9607(a) 2, 3
§ 107(a)-(b), 42 U.S.C. 9607(a)-(b) 3
§ 107(b), 42 U.S.C. 9607(b) 14
§ 107(a)(2), 42 U.S.C. 9607(a)(2) 24, 25, 26
§ 107(a)(3), 42 U.S.C. 9607(a)(3) 12, 13, 18, 24
§ 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B) 3
§ 113(f), 42 U.S.C. 9613(f) 3
§ 120(a)(1), 42 U.S.C. 9620(a)(1) 3
Fed. R. Civ. P. 54(b) 13

Miscellaneous: Page

Jerry Clifford, Director, Office of Site Remediation Enforcement, *Documentation of Reason(s) for Not Issuing CERCLA § 106 UAOs to All Identified PRPs* (Aug. 2, 1996) <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/reasbn-cer106-rpt.pdf> 16

In the Supreme Court of the United States

No. 02-500

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 02-506

SHELL OIL COMPANY AND UNION OIL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 294 F.3d 1045.[1] The orders of the district court issued on September 28, 1993 (Pet. App. 84a-107a), and August 11, 1998 (Pet. App. 57a-83a), are reported at 841 F. Supp. 962 and 13 F. Supp. 2d 1018. The

[1] References to "Pet. App." are to the appendix to the petition in No. 02-500.

orders of September 18, 1995 (Pet. App. 31a-47a), November 2, 1998 (Pet. App. 55a-56a), and October 12, 1999 (Pet. App. 48a-54a), are unreported.

JURISDICTION

The judgment of the court of appeals was initially entered on February 11, 2002. Petitions for rehearing were denied and a revised opinion was entered on June 28, 2002. Pet. App. 2a-3a. The petitions for a writ of certiorari were filed on September 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation concerns payment for the cleanup of the McColl Superfund Site in Fullerton, California. Petitioners Shell Oil Co., Union Oil Co., Atlantic Richfield Co., and Texaco, Inc. used the McColl site to dispose of acid waste they generated in manufacturing various petroleum products for sale to government and private purchasers during and after World War II. The district court held both petitioners and the United States liable as "arrangers" for the disposal of the waste but allocated the United States the responsibility to pay all of the cleanup costs. The court of appeals reversed in part and affirmed in part, holding as relevant here that the United States arranged for the disposal of only a portion of the waste and is responsible for only the costs relating to that portion.

1. Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607, allows those who respond to releases or threatened releases of hazardous substances to sue certain persons for cost recovery. 42 U.S.C. 9607. Section 107(a) specifies the categories of potentially responsible parties:

> (1) the owner and operator of a * * * facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility * * * owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.

42 U.S.C. 9607(a). Liability under Section 107 is strict, with only certain limited defenses. 42 U.S.C. 9607(a)-(b).

Each responsible party is liable in contribution for costs incurred by other responsible parties. 42 U.S.C. 9607(a)(4)(B), 9613(f). Section 120(a)(1) of CERCLA provides in relevant part:

> Each department, agency, and instrumentality of the United States * * * shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107].

42 U.S.C. 9620(a)(1); see *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 10 (1989). Accordingly, the United States is sometimes subject to CERCLA claims.

2. a. By the early 1930s, petitioners began developing a specialized high-octane petroleum product for use in military and private aviation. Pet. App. 5a; Stip. 18-41 (L9-L13).[2] By the mid-1930s, they had negotiated contracts to sell this aviation gasoline, or "avgas," to the military and had begun discussing high-octane technology with the private aviation industry.[3] Stip. 19-28, 36, 39 (L9-L13). Through the onset of World War II, petitioners continued refining the technology and establishing the plants necessary for large-scale avgas production based on anticipated demand. Stip. 25-41, 123-136 (L10-L13, L30-L32).

Because avgas was critical to the war effort, the United States closely regulated its production during World War II. Pet. App. 6a; Stip. 4-6, 44 (L6, L14). In 1942, President Roosevelt established several agencies to oversee wartime production, including the War Production Board (WPB) and the Petroleum Administration for War (PAW). Pet. App. 6a; Stip. 42-91 (L13-L22). Under the nationwide priority rankings system, WPB regulated the flow of certain scarce goods. Pet. App. 6a; Stip. 52-55 (L15). PAW set national goals for the production of high-octane gasoline and set priorities on materials directly affecting the petroleum industry, such as avgas components and avgas itself. Stip. 17, 87-91 (L8-L9, L21-L22). Acting through such agencies, the United States had statutory authority to compel refin-

---

[2] The parties agreed to 624 stipulated facts before the district court. Following the lead of petitioners Shell and Union in No. 02-506, references to a stipulation in this brief identify the number of the stipulation and the appropriate page of the material they lodged with this Court.

[3] Petitioners Shell and Union err in stating that avgas "was a wartime product produced solely for the United States." 02-506 Pet. 4.

ers to produce priority products, including avgas, to their existing capacity or even to seize refineries if necessary.[4] The government, however, very rarely used that authority, choosing instead to promote avgas production almost exclusively through non-coercive measures such as recommendations and contracts.[5] Pet. App. 6a; Stip. 43-44, 57, 59, 146-158, 200-201 (L13-L16, L36-L38, L46).

The United States also employed programs such as the Planned Blending Program to gather and use inventory information to maximize avgas production. Pet. App. 6a-7a. Before the war, petitioners had shared their avgas technology with each other and had commonly exchanged products to balance out their product requirements. Stip. 125-127, 135-137, 210 (L30-L33, L48). The Planned Blending Program built on that practice: industry representatives would report on their anticipated supplies and use of avgas components, and the United States would occasionally instruct them on how to shift the supplies among themselves so that they could be used to maximum advantage. Pet. App. 6a-7a; Stip. 221-241 (L51-L59). The Planned Blending Program directly affected only how companies blended avgas components after their manufacture and thus did

---

[4] Petitioners ARCO and Texaco err in stating (02-500 Pet. 5) that WPB and PAW could "compel refiners to increase their existing capacity to produce certain fuels." See Stip. 57, 59 (L15-L16) (government could "require a company to produce a good needed for the war effort *where it was within the company's physical and technical capacity to do so*") (emphasis added); see also Stip. 200-201 (L46).

[5] The few seizures in the record occurred at the end of or after the war and were "paper seizures" intended to aid the petroleum industry in the face of labor problems. Stip. 289-295 (L67-L68); L226-L228.

not directly affect waste generation, which occurred during the production of avgas components, not their blending. Pet. App. 7a; Stip. 14-16, 221, 225 (L8, L51-L52).

Within the regulatory structure described above, petitioners were active and eager participants in the avgas industry. Before, during, and after the war, each of petitioners owned and operated one or more refineries that manufactured avgas and other products and that produced acid waste. Stip. 144, 174, 495-496, 499 (L35, L41, L129-L130). Petitioners actively initiated proposals before and during the war for priority rankings to obtain construction materials to expand their refineries for avgas production and, when they received the necessary approvals, invested tens of millions of dollars to do so. Stip. 147, 162, 268-278 (L36, L39, L64-L66). The United States solicited such proposals from refiners and made construction loans and tax benefits available to owners of refineries that produced avgas, but imposed no requirement that refiners submit any such proposals. Stip. 152, 155-156, 162-163, 532-542 (L37-L39, L140-L142).

Much as they made independent decisions to build and expand refineries to produce avgas, petitioners actively and independently pursued contracts to sell avgas to the United States. Pet. App. 7a; Stip. 19-26, 154-158, 166 (L9-L10, L38, L40). The contracts were negotiated individually with each refiner and contained individualized terms suiting particular refiners' interests. Stip. 159-161, 164-168, 181-183 (L39-L40, L42-L43). The United States generally agreed to purchase petitioners' entire output of avgas at a fixed price for three years. Stip. 148-158 (L36-L38). That price was negotiated individually with each company and gener-

ally included an estimated profit of six to seven percent. Stip. 164-170 (L39-L40).

Although the United States built and owned some refineries during the war, the plants relevant here existed in some form prior to the war and were designed, built, and owned in full by petitioners. Pet. App. 7a; Stip. 74, 174, 267, 281 (L19-L20, L41, L64, L66). Petitioners were responsible for the daily operation and maintenance of the physical equipment. Stip. 279, 287-288 (L66-L67). Petitioners handled their own personnel matters at the plants and selected their own officers and management. Stip. 280, 282 (L66).

Petitioners received significant benefits from the avgas program. In addition to their direct profit under the wartime contracts, petitioners made plans from the very beginning of the war to market and expand their production of high-octane gasoline at war's end. Stip. 29-41, 298-300 (L11-L13, L68-L69). After the war, petitioners retained ownership of the facilities they had built with the help of government loans. Pet. App. 7a; Stip. 152 (L37-L38). Although it was expected that military demand for avgas would drop, the oil industry anticipated that higher octane fuels would have significant application in the private automobile and aviation industries, and petitioners held a tremendous competitive advantage after the war because of their participation in the avgas program. Stip. 297-317 (L68-L72).

b. To produce avgas, refiners used sulfuric acid, which served as a catalyst in the "alkylation" process. Stip. 14, 493-494 (L8, L128-L129). That process produced an avgas component known as "alkylate" as well as "spent alkylation acid" (about 87%-90% acid by weight), which remained relatively high in acid content and thus was a valuable commodity. *Ibid.* Spent alkylation acid could be used for other purposes, reproc-

essed into fresh sulfuric acid, or sold to other users. Pet. App. 5a, 7a; Stip. 325, 329, 343, 346 (L73-L75, L77).

The production of avgas was, however, not petitioners' sole reason to use acid and produce acid waste. One important use for acid was the acid treatment process, used by refiners for decades before the war, in which refiners removed impurities from petroleum fractions for use in avgas or other products. Pet. App. 7a-8a; Stip. 15-16, 325, 344, 431, 484, 496, 499, 514-515 (L8, L73-L74, L77, L103-L104, L124, L129, L130, L133). Acid treatment converted fresh acid or spent alkylation acid into acid sludge, which had lower acid content (about 45%-65% acid by weight). Pet. App. 8a; Stip. 324, 496 (L73, L129). Refiners generally did not reuse acid sludge, and reprocessing it was technically feasible but relatively difficult and expensive. Pet. App. 8a; Stip. 329, 376, 382 (L74-L75, L84, L87). Thus, when the war began, acid sludge dumping and burning were common practices in California and nationwide. Pet. App. 8a; Stip. 326-328, 409-410, 443-448 (L74, L94, L114-L115).

During the war, petitioners contracted with Eli McColl, a former Shell employee, for the disposal of some of their acid waste. Pet. App. 9a; Stip. 1, 435-442 (L6, L111-L113). He was paid a fee per barrel of waste removed and guaranteed a minimum number of barrels. Stip. 475-478 (L122-L123). He dumped the waste at a site in Fullerton, California, from June 1942 until September 1946, more than a year after war's end. Pet. App. 9a; Stip. 2 (L6). Although the waste at the McColl site included some spent alkylation acid, the vast majority was acid sludge, the same refinery by-product that petitioners had produced and dumped or burned long before the development of avgas and the associated alkylation process. Pet. App. 9a, 70a. Although all the

spent alkylation acid at the McColl site was directly connected to the avgas program, most of the acid sludge was not.[6] *Id.* at 9a. Instead, it was the direct result of acid treatment in the production of various items for military and civilian sale.[7] *Ibid.*; Stip. 325, 427, 431, 493-496 (L73-L74, L98, L103-L104, L128-L129). A small portion of the waste at the McColl site was acid sludge resulting from Shell's treatment of a government-owned supply of a chemical called benzol. Pet. App. 9a, 69a; Stip. 432- 434, 498 (L110-L111, L130).

The United States was not directly involved with dumping operations at the McColl site. It issued no orders requiring or approving the dumping of acid waste. Pet. App. 9a; Stip. 400 (L92). It was not party to or aware of Eli McColl's disposal contracts with petitioners. Pet. App. 9a; Stip. 480 (L123). Indeed, the wartime avgas contracts between the United States and petitioners contained no provisions regarding waste ownership, handling, or disposal, which remained petitioners' responsibility. Stip. 184-185 (L43).

Although the WPB priorities system was concerned with the efficient use of goods and facilities for the war

---

[6] Although the avgas program led to an increase in spent alkylation acid, which was the direct result of the alkylation process, petitioners ARCO and Texaco err in stating that the program also increased the amount of acid sludge produced at their refineries. 02-500 Pet. 8. Acid sludge production remained relatively constant even as avgas production increased greatly. Stip. 319 (L72); Gov't C.A. E.R. 475, 521, 532-533, 537, 544-546.

[7] An expert testified at trial that the avgas program resulted in at most 13% of the acid sludge. Pet. App. 70a. Petitioners ARCO and Texaco state that all the waste resulted from the manufacture of "wartime products" for which the United States was the "exclusive ultimate purchaser" (02-500 Pet. 3), but the stipulated facts indicate otherwise. Stip. 431 (L103-L104).

effort, not with waste disposal, that system did have the potential to affect the amount of acid waste eventually dumped. Pet. App. 8a. Those wishing to use scarce materials during the war to construct acid waste reprocessing facilities needed WPB approval, and the United States thus had the power to limit the reprocessing industry's capacity. Stip. 52-53, 338-342 (L15, L76). During the war, however, the WPB approved many applications to build reprocessing plants in Southern California and declined only one, on the basis that then-existing facilities appeared sufficient. Stip. 351-353, 379-383 (L78, L85-L87). Indeed, from before the war through late 1944, spent alkylation acid reprocessing capacity in Southern California appeared to meet refiners' needs. Petitioners contracted with companies such as Stauffer Chemical Company (Stauffer) to reprocess spent alkylation acid they did not use within their refineries. Stip. 343-353 (L77-L78). They dumped spent alkylation acid at the McColl site only because technical problems at a Stauffer plant led to a temporary shortfall of reprocessing capacity in Southern California. Stip. 357-365, 493 (L78-L81, L128). The dumping ended after petitioners reached agreement with another company for temporary use of a storage tank. Stip. 366-371 (L81-L83).

Government regulation similarly had little effect on petitioners' disposal choices regarding acid sludge. Petitioners generally continued their pre-war practice of dumping or burning acid sludge. Stip. 409-412, 489, 506-509 (L94-L95, L125-L126, L131). Among petitioners, only Texaco requested a priority rating to construct an additional plant to reprocess acid waste. Stip. 379-381 (L85-L87). Although WPB denied Texaco's request, it approved Stauffer's request to build a much larger plant designed to reprocess both spent

alkylation acid and acid sludge. Stip. 357, 379-381 (L78-L79, L85-L87). If not for unexpected technical problems (which were not caused by the United States), that plant would have been available to handle acid sludge when Texaco began dumping late in the war. Stip. 357, 508-511 (L78-L79, L131-L132).

Another alternative to dumping or burning acid sludge, occasionally used by petitioners, was to ship acid sludge using railroad tank cars to Shell's fertilizer plant near San Francisco. Stip. 411, 513 (L94, L132-L133). Tank car shortages were an issue during the war, but dumping rarely resulted from tank car shortages.[8] Stip. 404-405 (L93). Furthermore, although WPB took steps to try to alleviate such shortages, companies were ultimately responsible for making their own arrangements for tank cars. Stip. 403 (L93). Petitioners introduced no evidence that they ever requested WPB to use its authority to provide them with tank cars.[9] In any case, whatever the effect of wartime controls, petitioners continued dumping acid sludge after the war, both at the McColl site and elsewhere.[10] Pet. App. 29a; Stip. 2, 428 (L6, L98-L99).

---

[8] The periods of dumping did not correlate well with the periods of tank car shortages. Stip. 414-420 (L95-L97); Gov't C.A. E.R. 506-518. Indeed, during the war, Shell's fertilizer plant had virtually all the acid sludge it needed from local sources. Gov't C.A. E.R. 4-5, 529-530.

[9] Eli McColl testified before a county commission in 1942 that "the government [would] not allow [him or the companies he represented] to use tank cars," but he did not indicate whether he had ever requested tank cars or was merely making a prediction. Stip. 487 (L125).

[10] Petitioners ARCO and Texaco err in stating that dumping "ceased when wartime production controls ceased and reprocessing alternatives again became available." 02-500 Pet. 8 n.4.

3. On February 1, 1991, the United States and the State of California sued petitioners and other companies no longer involved to recover costs incurred at the McColl site. In response, petitioners filed counterclaims alleging that, through its wartime regulation of the petroleum industry, the United States "arranged for disposal" of the waste at the McColl site and was thus liable under Section 107(a)(3) of CERCLA. While litigation continued, petitioners implemented a cleanup remedy at the site pursuant to an administrative order issued by the United States Environmental Protection Agency under Section 106, 42 U.S.C. 9606. Cleanup at the McColl site ultimately cost close to $100 million. Pet. App. 9a. In 1998, the site was converted into a wildlife sanctuary and community recreation facility. *Ibid.*

On September 28, 1993, the district court entered partial summary judgment for the plaintiffs regarding petitioners' liability. Pet. App. 106a. The United States and petitioners thereafter submitted 431 stipulated facts (L1-L106) and filed cross-motions for partial summary judgment on the counterclaims. On September 18, 1995, the district court entered partial summary judgment for petitioners regarding the liability of the United States. Pet. App. 46a.

In February 1998, after the submission of another 193 stipulated facts (L107-L168), the district court conducted a trial to allocate the response costs between petitioners and the United States. Pet. App. 58a. On August 11, 1998, based on its conclusions that all the waste in question was attributable to the avgas and benzol programs and that the United States should bear total responsibility for such waste, the district court issued a memorandum and order assigning the United States responsibility for all the cleanup costs at

the McColl site. *Id.* at 83a. The district court later entered a final judgment under Federal Rule of Civil Procedure 54(b). Pet. App. 51a.

4. The court of appeals reversed in relevant part. Pet. App. 1a-30a. The United States had earlier conceded that it had arranged for disposal of the portion of waste at the McColl site related to Shell's processing of government-owned benzol. *Id.* at 4a. About 5.5% of the waste at the site was related to benzol. *Id.* at 9a, 69a. Thus, the court of appeals considered whether the United States arranged for disposal of the "non-benzol waste" comprising the other 94.5% of the waste. *Id.* at 14a-24a.

The court of appeals first rejected the possibility of "direct arranger liability." Pet. App. 15a-17a. The district court had found that the United States had affirmatively "undertak[en] the responsibility for disposing" of the waste at the McColl site. *Id.* at 45a-46a. Referring to the stipulated facts, the court of appeals stated: "There are simply insufficient facts in the record to support a conclusion that the United States directly entered into arrangements to dispose of acid waste at the McColl site." *Id.* at 16a-17a.

The court of appeals next concluded that the facts also would not support arranger liability for non-benzol waste on a broader theory based on the United States' supposed control over avgas manufacture. Pet. App. 17a-24a. The court of appeals agreed with petitioners that "control is a crucial element of the determination of whether a party is an arranger" under Section 107(a)(3). *Id.* at 17a. Furthermore, it recognized that "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability." *Ibid.* Thus, it recognized that its task required comparing the facts here with those of other decisions—in

particular, decisions considering what kind of control a party must exercise over a process that produced hazardous waste in order to impute arranger liability to that party for the eventual disposal of that waste. *Id.* at 17a-24a. Based on a detailed comparison of the facts here with those in other cases, the court of appeals concluded that the United States did not exercise the kind of control over the avgas process necessary to find that the United States indirectly arranged for the disposal of non-benzol waste. *Ibid.*

The court of appeals disagreed with petitioners' contention based on *United States* v. *Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*), 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), that "mere 'authority to control' is sufficient." Pet. App. 20a. Unlike a party found responsible as an arranger in that decision because he held direct authority to control through a corporate chain of command, "the United States neither exercised actual control, nor had the direct ability to control, in the sense intended in *NEPACCO*." *Id.* at 21a. The court of appeals agreed with a district court decision that arranger liability should not apply to "a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue." *Id.* at 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

The court of appeals also rejected the contention that "the government's activities * * * constituted an 'act of war'" that absolved petitioners of liability under Section 107(b). Pet. App. 27a-29a. Even if petitioners had shown that the government's activities constituted such an "act of war," those activities were not the sole cause of petitioners' disposal actions, as required to defeat liability under that provision:

> The undisputed facts indicate that [petitioners] had other disposal options for their acid waste, that they dumped acid waste from operations other than avgas production at the McColl site, and that they were not compelled by the government to dump waste in any particular manner.

Id. at 29a.[11]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. It is also highly fact-specific, involving the legal consequences under CERCLA of a unique World War II-era system of regulation, as applied to the production and disposal of particular products. Further review is not warranted.

1. The decision of the court of appeals is correct. This case does not involve the ordinary scenario for arranger liability, in which a party generates hazardous waste and directly contracts with another party for disposal or treatment of that waste, for the United States neither generated nor made any arrangements regarding the waste at the McColl site. Stip. 184-185, 400 (L43, L92). Petitioners claim that the United States is liable under a broader theory of arranger liability, both because of the government's purchase of avgas and regulation of avgas manufacture and because

---

[11] The court of appeals affirmed the district court's conclusions that the United States had waived its sovereign immunity to petitioners' counterclaims and that the United States should bear full responsibility for cleanup of benzol-related costs. Pet. App. 10a-14a, 24a-27a.

of its actions affecting petitioners' disposal options other than dumping.[12]

a. Under CERCLA, one who effectively controls another party may be found liable for that party's arrangements for disposal of waste. In such a case, the question is "whether in light of all the circumstances the transaction involved an arrangement for disposal or treatment of a hazardous waste." *Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 566 (9th Cir. 1994) (per curiam); see *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380-1381 (8th Cir. 1989). As the court of appeals concluded, the facts of this case do not support a finding of arranger liability under that principle.

Petitioners argue (02-500 Pet. i, 3; 02-506 Pet. 13-16) that the United States is liable because it coerced them into producing avgas. Petitioners, however, were willing and eager participants in the avgas market. They began developing avgas technology well before the war. Stip. 18-41 (L9-L13). They actively sought avgas con-

---

[12] The United States denies petitioners' contention (02-500 Pet. 19-20) that it would seek to impose arranger liability upon a private party in its position. The Environmental Protection Agency enforces CERCLA against federal agencies and has issued guidance requiring that it treat federal entities as it would treat private parties. See Jerry Clifford, Director, Office of Site Remediation Enforcement, *Documentation of Reason(s) for Not Issuing CERCLA §106 UAOs to All Identified PRPs* 3 & n.2 (Aug. 2, 1996), <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf>. On a related note, petitioners' contention (02-500 Pet. 25-26; 02-506 Pet. 20, 27-28) that the court of appeals improperly treated the United States differently from private parties is also mistaken. The court of appeals applied general principles under CERCLA to the unique facts presented in this case.

tracts and initiated proposals before and during the war to expand their refineries to meet demand. Stip. 147, 154-158, 268-278 (L36, L38, L64-L66). There is no evidence that petitioners ever desired to stop producing as much avgas as the United States would buy.[13] The United States did not coerce petitioners to produce avgas.

Petitioners also err (02-500 Pet. 7 n.3 (quoting Pet. App. 45a)) when they state that it was "undisputed" that the United States "controlled the specifications, quantities, delivery, and price of avgas". The United States controlled those terms only in the sense that every party controls the terms on which it chooses to contract; petitioners exercised similar control. The avgas contracts were based on petitioners' own proposals and included unique terms tailored to each company's particular interests. Stip. 159-161, 166, 181-183 (L39-L40, L42-L43). Contrary to petitioners' contentions (02-500 Pet. 7 & n.3; 02-506 Pet. 6-13), the Planned Blending Program did not provide the United States with substantial control over avgas production. That program did not involve the production of avgas components, which was responsible for the waste at issue here, see Stip. 9, 14-16 (L7-L8), but rather the blending of those components after production. Stip. 212, 221-225 (L49, L51-L52). Moreover, although the United States could require a transfer when one refinery's surplus of an avgas component could offset a deficit of another (in a fashion similar to refiners' pre-war pro-

[13] Former PAW official J. Howard Marshall, one of the witnesses whose testimony petitioners emphasize, testified that the United States "never really had to" invoke its wartime powers to force refiners to produce avgas. L174. Indeed, the President of Union Oil urged the United States to assume greater regulatory authority over avgas production. Stip. 101 (L24).

duct exchanges), the government usually accepted refiners' blending recommendations without alteration. Stip. 210, 225 (L48, L52). Accordingly, the parties stipulated that "[t]here is no direct evidence linking the Planned Blending Program to waste dumping at the McColl Site." Stip. 610 (L163).

b. Petitioners also contend (02-500 Pet. 3, 7; 02-506 Pet. 16-18, 23) that the United States "arranged for disposal" of the waste at the McColl site because it allegedly denied them resources for waste disposal. Petitioners, however, had alternatives to dumping at the McColl Site. See pp. 10-11, *supra*. Petitioners contend, for instance, that burning was an unpleasant option (02- 500 Pet. 8-9 n.4; 02-506 Pet. 17), but it was one they had used before the war and continued using during the war despite their professions of distaste today. Stip. 327, 372, 489, 500, 507-509, 513, 519, 521 (L74, L83, L125-L126, L130-L138). Contrary to petitioners' contention (02-500 Pet. 7; see *id.* at 8 n.4, 9), "[t]he undisputed facts indicate that [petitioners] had other disposal options for their acid waste * * * and that they were not compelled by the government to dump waste in any particular manner." Pet. App. 29a. Moreover, dumping was an option that petitioners had used before the war and continued using after the war, both at the McColl site and elsewhere. Stip. 2, 327-328, 409-410, 428, 443-448 (L6, L74, L94, L98-L99, L114-L115).

In addition, petitioners' theory that the government is liable as an "arranger" under CERCLA because it limited their disposal options is legally unsound. CERCLA requires proof of an "arrange[ment] for disposal or treatment" of a hazardous substance. 42 U.S.C. 9607(a)(3). That language predicates arranger liability on a party's affirmative acts regarding disposal. See *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d

1227, 1232 (6th Cir. 1996); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1506 (11th Cir. 1996); *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994). It is inconsistent with petitioner's theory that the United States arranged for disposal of the waste simply by taking unrelated actions that made it harder for petitioners to dispose of that waste.

In sum, while petitioners independently decided to manufacture avgas, controlled the day-to-day operations that produced waste, and arranged for that waste's disposal, the United States was two steps removed from dumping: it had no significant presence at or operational control over petitioners' refineries, and it had nothing to do with the site where Eli McColl eventually dumped petitioners' waste from those refineries. At root, petitioners' argument is that the United States is liable for the disposal of all waste produced by a closely-regulated industry. There is no indication that Congress meant to ascribe such a broad scope to arranger liability and so drastically burden government regulation of industrial practices.

2. Petitioners argue (02-500 Pet. 16-27; 02-506 Pet. 23-26) that the decision of the court of appeals conflicts with decisions of other courts addressing arranger liability under CERCLA. Petitioners contend that what they term "the Ninth Circuit's narrow focus on actual ownership or direct control over the disposal arrangements" conflicts with the decisions of several other courts of appeals, which in petitioners' view hold "that a causal nexus between a party's conduct and the waste disposal is *sufficient* to establish arranger liability." 02-500 Pet. 24 (emphasis added). The decision of the Ninth Circuit is consistent with the decisions of the other courts petitioners cite (*id.* at 20-24), many of

which the Ninth Circuit itself cited approvingly in its opinion.[14]

a. Initially, petitioners misread the Ninth Circuit's decision when they state (02-500 Pet. 16) that it "held that arranger liability requires either: (1) ownership of raw materials or intermediate products at another's facility or (2) direct control of the disposal of hazardous waste at a particular location." The Ninth Circuit did discuss the concepts of "ownership" and "direct control" in the process of distinguishing this case from the Eighth Circuit's decision in *NEPACCO*. But, contrary to petitioners' contention, the court of appeals did not hold that those are the exclusive factors on which arranger liability may be based. See Pet. App. 20a-21a. Instead, it explicitly and properly recognized that a party might be liable if it bore a "duty to dispose" of the hazardous materials, even if it did not directly arrange for disposal. *Id.* at 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)). Based on an analysis of the facts of this case, the court simply disagreed with petitioners' contention that the government's actions resulted in such a "duty to dispose" here.

Petitioners also misread the decisions of the other courts they cite to hold that a "causal nexus" between a party's conduct and the disposal of waste is "sufficient" to result in arranger liability under CERCLA. Although a "causal nexus" is no doubt necessary for arranger liability, no court has held that it is sufficient. A

---

[14] Compare, *e.g.*, 02-500 Pet. 21-22 and 02-506 Pet. 23-24 (relying on *General Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (per curiam)), with Pet. App. 22a (citing and quoting the same case); 02-500 Pet. 21 (relying on *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir.), cert. denied, 515 U.S. 1158 (1995)), with Pet. App. 23a-24a (relying on the same case).

manufacturer would not produce hazardous waste if not for its customers, for instance, but Congress obviously did not mean to impose arranger liability on every purchaser of a product whose manufacture generated hazardous waste. The question in cases like this one is not whether the putative arranger shares *any* causal relationship with waste disposal, but whether the putative arranger exercised sufficient control over the process of waste generation and disposal.

b. There is no conflict between the decision of the Ninth Circuit that the United States is not liable as an arranger on the facts of this case and the decisions of the other courts that petitioners cite holding that arranger liability under CERCLA was appropriate on the facts of those cases.

The decision in this case does not conflict with the Eighth Circuit's decision in *Aceto Agricultural Chemicals Corp.*, *supra* (cited at 02-500 Pet. 16-17). As the Ninth Circuit explained (Pet. App. 18a), *Aceto* involved a far closer relationship between the arranger and the waste, in which the arranger owned the raw materials, contracted out a crucial waste-producing intermediate step in the production process to another firm, and then received back the resulting product. See *Aceto*, 872 F.2d at 1381. Although ownership of the raw materials and finished products is not dispositive of arranger liability in all cases, it is a relevant factor that, together with the other differences between the cases, distinguishes this case from *Aceto*.

Similarly, the decision in this case does not conflict with the Eighth Circuit's decision in *NEPACCO* (cited at 02-500 Pet. 17-20). In that case, the court held that the president of a corporation could be held liable as an arranger for the disposal of waste, where a subordinate official exercised actual control over the disposal of the

waste at issue. As the court of appeals explained in distinguishing *NEPACCO*, the United States would be liable as an arranger in this case if "authority to control * * * were sufficient without more" to establish liability. Pet. App. 20a. The decision in *NEPACCO* was based, however, not on an abstract "authority to control," but on the fact that "responsible officials in the chain of command of a corporation may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the corporation, and the other officer has the authority to control the first officer." *Id.* at 20a-21a. See *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (test is whether purported arranger "*exercise[d]* actual or substantial control, directly or indirectly, over the arrangement for disposal") (emphasis added), cert. denied, 519 U.S. 808 (1996). The mere fact that the United States had the (largely unexercised) regulatory authority to order petitioners to take various actions during World War II does not put the United States in the same position with respect to the disposal of petitioners' waste that a president of a corporation occupies with respect to other corporate officers who directly arrange for the disposal of waste.

Petitioners' other claims of conflict are similarly mistaken. In *General Electric Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992) (per curiam) (cited at 02-500 Pet. 22), the court held that certain oil companies were not liable under CERCLA as "arrangers" for the disposal of motor oil that was stored by dealers at service stations leased from the companies. That holding is entirely consistent with the court of appeals' decision that the government is not liable as an arranger in this case. Indeed, the court of appeals here relied in part on *General Electric*'s statement, cited by

petitioners (02-500 Pet. 22), that arranger liability turns in part on whether there is "the *obligation* to exercise control over hazardous waste disposal." 962 F.2d at 286 (cited at Pet. App. 22a). The court of appeals' decision is also entirely consistent with petitioners' position that "whether such [an] obligation exists is based on the party's conduct as it relates to the disposal of hazardous waste." 02-500 Pet. 22 (citing *General Electric*). The court of appeals simply concluded that, on the facts of this case, as in *General Electric*, the government's conduct did not lead to such an "obligation to exercise control."[15]

Petitioners contend (02-500 Pet. 22-23) that the decision in this case conflicts with decisions of the Fifth and Eleventh Circuits that a determination of arranger liability must "focus on all of the facts in a particular case." *South Fla. Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996); see *Geraghty & Miller, Inc.* v. *Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000) ("totality of the circumstances"). The court of appeals in this case similarly concluded that "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability under [CERCLA]." Pet. App. 17a. Indeed, the court in this case undertook an exhaustive review of all of the relevant facts in this case before concluding that arranger liability should not be imposed. See *ibid.* ("[W]e are required to sort through the fact patterns of the decided cases in order to find similarities and dissimilari-

---

[15] For the same reason, the decision of the court of appeals is entirely consistent with the Eleventh Circuit's recognition of "the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise." 02-500 Pet. 23 (quoting *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir. 2000)).

ties to the fact pattern of [this] case."). The reasoning and result of the court of appeals in this case are consistent with the Fifth and Eleventh Circuit cases cited.

3. a. Petitioners also assert (*e.g.*, 02-506 Pet. 3) that the court of appeals' decision conflicts with the Third Circuit's en banc decision in *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833 (1994). *FMC* involved "operator" liability under Section 107(a)(2), not, as in this case, "arranger" liability under Section 107(a)(3). Under Section 107(a)(2) of CERCLA, liability attaches to any party who "operated" a facility at a time when hazardous waste was disposed there. 42 U.S.C. 9607(a)(2). Petitioners contend (02-506 Pet. 26) that the statutory distinction between "operator" liability and "arranger" liability "has no bearing," and that the Ninth Circuit's decision conflicts with *FMC*.

Petitioners are mistaken (02-506 Pet. 26-28) that the distinction between "operator" liability and "arranger" liability is of no significance. The two species of liability are based on different statutory provisions and require different elements of proof. Under Section 107(a)(2), a party who "owned or operated" a facility at which "hazardous substances were disposed of" is liable. 42 U.S.C. 9607(a)(2). By contrast, Section 107(a)(3) imposes liability on a party that "arranged for disposal or treatment * * * of hazardous substances." 42 U.S.C. 9607(a)(3). Whereas the former inquiry focuses on the question of ownership or operation *of the facility*, the latter inquiry focuses on the question of arranging for the disposal *of the substances*. See *TIC Inv. Corp.*, 68 F.3d at 1090 n.7 ("The language related to operator liability * * * does not require any involvement in the disposal activities themselves."). Petitioners cannot simply import analyses relating to "operator" liability

without accounting for the differences in the statutory formulae.

In any event, even if the two types of liability had identical prerequisites, petitioners' claim of conflict would be mistaken. As the court of appeals in this case explained, the court in *FMC* found the United States liable as an operator of a wartime plant where the United States required the owner of that plant to convert it to manufacture rayon; owned much of the manufacturing equipment; required the use of government-supplied raw materials; participated in managing and supervising the workers; and directly controlled the manufacturing process. Pet. App. 22a-23a; see *FMC*, 29 F.3d at 836-837. In this case, the government did not require petitioners to manufacture any product that they sought to avoid; did not own any of the manufacturing equipment; did not supply the raw materials; did not participate in managing and supervising the workers at petitioners' facilities; and did not directly control the manufacturing process. The degree of control in *FMC* was substantially greater than that here. There is thus no conflict.[16]

b. Petitioners invoke (02-506 Pet. 3, 22, 26) this Court's decision regarding "operator" liability under Section 107(a)(2) in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), although they do not expressly assert that the decision of the court of appeals conflicts with it. In

---

[16] Moreover, as the court of appeals found, the *FMC* court divided evenly on the question whether the United States bore arranger liability. Pet. App. 23a; *FMC*, 29 F.3d at 845-846. The court of appeals thus recognized: "If it was a close question on the facts of *FMC* * * * , it cannot possibly be a close question on the facts in the case before us." Pet. App. 23a. The result in *FMC* also shows the error in petitioners' attempt to eliminate the distinction between operator liability and arranger liability.

Bestfoods, this Court considered whether and when a parent corporation would share its subsidiary's "operator" liability under Section 107(a)(2). 524 U.S. at 61-64. Petitioners contend that their wartime relationship with the United States was comparable to a parent-subsidiary relationship. 02-506 Pet. 15-16, 21-23. That comparison is weak. Unlike a parent corporation, the United States held no interest in petitioners' refineries, made no profits from petitioners' business, and did not manage petitioners' operations. Its relationship with petitioners' plants was based on contract and regulation, not ownership and management. Accordingly, there is no basis in this case to apply to the United States the "veil piercing" theory of "operator" liability that the Court discussed in *Bestfoods*.

Absent piercing, the pertinent question under *Bestfoods* is whether the parent's actual actions regarding hazardous waste (as opposed to the parent's general control over the subsidiary) make the parent directly (as opposed to derivatively) liable. 524 U.S. at 64-67. This Court explained:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67. The United States did not "operate" petitioners' refineries within the meaning of CERCLA and thus should not be held responsible for the arrangements for disposal of the waste generated there. In-

deed, numerous courts have declined to impose "operator" liability on the United States on similar facts dealing with wartime industrial regulation. See *East Bay Mun. Util. Dist.* v. *United States Dep't of Commerce*, 142 F.3d 479, 484-487 (D.C. Cir. 1998); *United States* v. *Vertac*, 46 F.3d 803, 808 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Washington* v. *United States*, 930 F. Supp. 474, 483-485 (W.D. Wash. 1996); *Maxus Energy Corp.* v. *United States*, 898 F. Supp. 399, 408 (N.D. Tex. 1995), aff'd, 95 F.3d 1148 (5th Cir. 1996) (Table); *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1450-1451. The decision of the court of appeals comports fully with those decisions and with *Bestfoods*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
DAVID C. SHILTON
TODD S. KIM
Attorneys

DECEMBER 2002

(3) (3)

Nos. 02-500, -506

Supreme Court, U.S.
FILED
DEC 2 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY and TEXACO, INC.

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

SHELL OIL COMPANY and UNION OIL COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE PETITIONERS

Daniel M. Steinway
Thomas C. Jackson*
Adam S. Vann
KELLEY DRYE & WARREN LLP
1200 19th Street, NW, Ste 500
Washington, DC 20036
(202) 955-9600

Counsel for Amicus Curiae
**Counsel of Record*

G. William Frick
Ralph J. Colleli, Jr.
Erik Milito
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Counsel for Amicus Curiae

THE LEX GROUP^{DC} • One Massachusetts Ave., NW • Suite 670 • Washington, DC 20001
(202) 789-2400 • Fax: (202) 789-1911 • www.thelexgroupdc.com

21 pp

TABLE OF CONTENTS

Page(s)

INTEREST OF THE AMICUS CURIAE.....1

SUMMARY OF THE ARGUMENT.....2

REASONS FOR GRANTING THE WRITS.....4

I. THE NINTH CIRCUIT RULING WILL HAVE A SUBSTANTIAL IMPACT ON THE SCOPE OF LIABILITY UNDER CERCLA.....4

A. The Scope of CERCLA "Arranger" Liability Potentially Affects the Allocation of Responsibility For Billions of Dollars in Cleanup Costs.....4

B. The Ruling Will Affect Determinations of Liability In a Wide Variety of Contexts.....10

II. THE NINTH CIRCUIT RULING EXPOSES MANUFACTURING INDUSTRIES THAT DO BUSINESS WITH THE UNITED STATES TO UNREASONABLE AND INEQUITABLE RISKS OF LIABILITY.....13

CONCLUSION.....15

TABLE OF AUTHORITIES

Page(s)

CASES

Boeing Co. v. Cascade Corp.,
207 F.3d 1177 (9th Cir. 2000) 15

Cadillac Fairview/California, Inc. v.Dow Chem. Co.,
299 F.3d 1019 (9th Cir. 2002) 7

Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.,
153 F.3d 344 (6th Cir. 1998) 5-6

Control Data Corp. v. S.C.S.C. Corp.,
53 F.3d 930 (8th Cir. 1995) 11

E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce,
142 F.3d 479 (D.C. Cir. 1998) 7, 11

Elf Atochem N. Am. v. United States,
914 F. Supp. 1166 (E.D. Pa. 1996).....7

FMC Corp. v. U.S. Dep't of Commerce,
29 F.3d 833 (3d Cir. 1994) 7

United States v. Anthony Dell'Aquilla,
Enters. & Subsidiaries,
150 F.3d 329 (3d Cir. 1998) 12

United States v. Bestfoods,
524 U.S. 51 (1998).....11

United States v. Cent. Eureka Mining Co.,
347 U.S. 155 (1958) 6

United States v. Power Eng'g Co.,
125 F. Supp. 2d 1050 (D. Colo. 2000), *aff'd*,
303 F.3d 1232 (10th Cir. 2002) 12

United States v. Shell Oil Co.,
13 F. Supp. 2d 1018 (C.D. Cal. 1998) 2

United States v. Shell Oil Co.,
294 F.3d 1045 (9th Cir. 2002) 2, 4, 5, 8

United States v. TIC Inv. Corp.,
68 F.3d 1082 (8th Cir. 1995) 4, 11

United States v. Vertac Chem. Corp.,
46 F.3d 803 (8th Cir. 1995) 7

STATUTES

42 U.S.C. §§ 9601-9675 1

42 U.S.C. § 9601(20)(F) 11

42 U.S.C. § 9607 ..... 4, 10

MISCELLANEOUS

General Accounting Office,
Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup (2002) 8

General Accounting Office,
Superfund: Progress and Challenges,
Testimony of David G. Wood, Associate Director,
Before the U.S. Senate Committee on Environment and Public Works (1999) 10

John Lord O'Brian & Manly Fleischmann,
The War Production Board Administrative Policies and Procedures,
13 Geo. Wash. L. Rev. 1 (1944) 7, 14

Michael T. Janik & Michael Reis,
CERCLA Claims Against the Government: Rediscovering World War II Contracting Rules 6

Nancy Perkins Spyke,
From War Strategy to Waste Strategy: The Validity of Government CERCLA Liability for War Production Site Cleanups,
4 N.Y.U. Envtl. L.J. 263 (1995) 6, 7

National Priorities List for Uncontrolled Hazardous Waste Sites,
67 Fed. Reg. 65,315 (2002) 9, 10

The American Petroleum Institute ("API") respectfully files this brief *amicus curiae* in support of petitioners Atlantic Richfield Company and Texaco, Inc. in Case No. 02-500 and petitioners Shell Oil Company and Union Oil Company in Case No. 02-506.[1] Because both of the petitions arise out of the same decision of the U.S. Court of Appeals for the Ninth Circuit and because the petitions raise substantially the same issue, API is filing this *amicus* brief in support of both petitions.[2]

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. API's members have been identified as potentially responsible parties at contaminated sites across the country pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), and have participated in cleaning up many such sites. Moreover, API's members have undertaken various activities for and at the direction of the United States and instrumentalities of the federal government. Therefore, API and its members have a substantial interest in the standards for liability for cleanup costs under CERCLA. In particular, API and its

---

[1] No counsel for any party has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief.

[2] Written consent has been obtained from counsel for all petitioners and the respondent for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the Clerk's Office.

members have a strong interest in the standards for determining the extent of the federal government's liability for the costs of cleaning up contamination at numerous sites throughout the country that are associated with wartime and other activities performed by industry on behalf of the United States.

SUMMARY OF THE ARGUMENT

The Court should grant the writs because the central issue raised in both petitions is a question of fundamental national importance that should be decided by this Court. Both petitions arise out of the Ninth Circuit's decision in *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) ("*Shell*"), in which the court held that the United States was not liable under CERCLA as an "arranger" for certain costs of cleaning up the McColl Superfund Site in Fullerton, California.[3] The court reached this conclusion despite the federal government's extensive involvement in the production of aviation fuel during World War II that resulted in the generation of the waste material disposed of at the McColl Site, and the government's effective foreclosure of other options for managing the waste.

The Ninth Circuit's ruling is of critical importance. First, the precedent established by the ruling could have

---

[3] The United States conceded that it had arranged for the disposal of waste at the McColl Site that was associated with the production of benzol (which was in turn used in the production of aviation gasoline), and therefore was liable under CERCLA for the costs of cleaning up such waste. *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018, 1024 (C.D. Cal. 1998). The benzol-related waste constituted 5.5% of the total waste at the McColl Site. *Id.* The petitions in this case relate to the costs of cleaning up the "non-benzol" waste at the Site.

important impacts on the scope of "arranger" liability under CERCLA generally, as well as on the extent to which the federal government will be required to contribute to the cost of cleaning up historic contamination caused by activities undertaken by private parties on behalf of and at the direction of the United States. The decision will in many cases determine who will have ultimate responsibility for paying the billions of dollars that have been and will be spent in cleaning up numerous sites across the country.

In addition, the Ninth Circuit's decision to limit the scope of the federal government's liability for the environmental consequences of activities in which the government was extensively involved and which were being undertaken for its benefit will undoubtedly affect future commercial relationships between industry and the United States. The decision creates a significant and inequitable risk of liability for industries that supply the United States with goods and services urgently needed in time of war or other national emergencies. The decision could in many instances force industries to accept the risk of such liability, despite its inequity, because the alternative of refusing to undertake work that serves a vital national interest is simply untenable or even unavailable. For these reasons and the reasons set forth in the petitions, the Court should grant the writs to provide direction to the lower courts in addressing these issues of fundamental national importance.

REASONS FOR GRANTING THE WRITS

I. THE NINTH CIRCUIT RULING WILL HAVE A SUBSTANTIAL IMPACT ON THE SCOPE OF LIABILITY UNDER CERCLA

A. The Scope of CERCLA "Arranger" Liability Potentially Affects the Allocation of Responsibility For Billions of Dollars in Cleanup Costs

The decision of the Ninth Circuit will have a significant impact on parties who face potential liability for the costs of cleaning up thousands of contaminated sites across the country. In particular, the Ninth Circuit's ruling will have an immediate and direct impact on the scope of liability under section 107 of CERCLA, 42 U.S.C. § 9607, for those who are alleged to have arranged for the disposal of hazardous substances at a site. In this case, the Ninth Circuit ruled that the United States did not arrange for the disposal of certain hazardous substances at the McColl Site and therefore should not be held responsible for cleaning up the vast majority of the contamination at this site. The court based its decision on the grounds that the U.S. neither owned the materials used in the manufacturing process that generated the waste nor exercised actual control over the waste disposal process. *Shell*, 294 F.3d at 1056-57. In doing so, the court rejected a test for imposing "arranger" liability on the basis of the authority to control the processes related to the generation and disposal of waste or the exercise of extensive indirect forms of control over such generation and disposal. Thus, the Ninth Circuit adopted a very narrow view of "arranger" liability that is sharply at odds with the rulings of other federal appellate courts. *See, e.g., United States v. TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995)

("*TIC*"). The impact of the ruling will be to effectively exempt certain types of parties from CERCLA liability in many cases, including those parties that exert substantial influence over the disposal of hazardous waste or have the authority to control such disposal but who do not exercise such control in ways that are direct and overt.

The ruling will clearly affect the allocation of CERCLA liability at sites within the Ninth Circuit. In addition, the Ninth Circuit's decision can be expected to serve as a precedent for courts in other circuits that have not yet definitively established standards for determining the scope of "arranger" liability. Even in those circuits where existing case law sets forth standards for "arranger" liability that conflict with the Ninth Circuit's holdings in this case, the analysis in *Shell* may nevertheless influence lower courts, for example, through the Ninth Circuit's narrow reading of precedents from other circuits. In any event, parties assessing their potential liability as arrangers in other circuits will be forced to weigh the potential influence of the Ninth Circuit's decision as indicating a trend in the case law toward a narrow view of "arranger" liability. Thus, the impacts of the Ninth Circuit decision could be felt far outside that court's jurisdiction.

The potentially dramatic impact of the Ninth Circuit's ruling in this case is underscored by the potentially enormous cost of the cleanups involved at contaminated sites to which the Ninth Circuit's ruling could apply, which could easily total billions of dollars. As the U.S. Court of Appeals for the Sixth Circuit has observed, "[w]ho bears the burden for hazardous waste cleanup costs is an issue of great consequence" in light of the steadily rising costs of cleaning up these contaminated sites. *Centerior Serv. Co. v. Acme Scrap Iron*

& Metal Corp., 153 F.3d 344, 349 n.9 (6th Cir. 1998) (noting that the average cost of cleanup at a CERCLA site had reached 25 to 30 million dollars).

The impacts of the Ninth Circuit's ruling that the United States is not liable for the costs of cleaning up contamination associated with the production of materials for the war effort will be felt most directly in cases involving the cleanup of other contaminated sites related to the production of materials by industry for the U.S. during both World Wars and other national emergencies. These activities involved not only the production of fuels, but also range from the manufacture of military equipment to the mining of necessary minerals. For example, this Court has previously examined the extensive involvement of the War Production Board ("WPB") in the mining industry as part of the nation's mobilization efforts during World War II. *See United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (claim for taking of private property resulting from WPB order directing the shutdown of certain gold mines). In fact, the scope of the WPB's authority was "astonishing in its breadth" and extended to many aspects of the American wartime economy. Nancy Perkins Spyke, *From War Strategy to Waste Strategy: The Validity of Government CERCLA Liability for War Production Site Cleanups*, 4 N.Y.U. Envtl. L.J. 263, 267 (1995) ("*War Strategy*"). *See also* Michael T. Janik & Michael Reis, *CERCLA Claims Against the Government: Rediscovering World War II Contracting Rules*, 66 Fed. Cont. Rep. (BNA) 207, 213-14 (1996) (reviewing the "extraordinary new world of federally ordered limitations, schedules, quotas, and employment rules" created between 1942 and 1945). The exercise of this authority led to the "direction and regulation of the industrial effort by the Federal Government, on a scale

and of an intensity unprecedented in the annals of our nation." John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. 1, 4 (1944) ("*War Production Board*").

The extensive involvement of the federal government in war production activities has already given rise to a number of cases involving claims for recovery of the costs incurred in cleaning up the hazardous waste generated by these efforts. *See, e.g., FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) ("*FMC*") (liability for cleanup of wastes associated with rayon production); *E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F.3d 479 (D.C. Cir. 1998) (zinc mining) ("*East Bay*"); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002) (synthetic rubber production); *Elf Atochem N. Am. v. United States*, 914 F. Supp. 1166 (E.D. Pa. 1996) (production of poison gas). These claims also extend to sites that were contaminated as a result of production of materials for other war efforts. *See, e.g., United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (production of Agent Orange for use in Vietnam). Given that "the number of private sites that could contain wastes derived from war production activities is potentially enormous," *War Strategy*, 4 N.Y.U. Envtl. L.J. at 269, the number of such claims can be expected to increase in the future.

In all of these cases, the courts have been or will be called upon to determine whether the costs of war should be placed solely on individual companies contributing to the war effort or should instead be shared by society as a whole. The latter result has been held by the U.S. Court of Appeals for the Third Circuit to be "neither untoward nor inconsistent with the policy underlying CERCLA." *FMC*, 29 F.3d at 846. The Ninth Circuit itself recognized

in this case that cleanup costs from wartime activities should properly be seen "as part of the war effort for which the American public as a whole should pay." 294 F.3d at 1060. Nevertheless, the Ninth Circuit held that the United States had no responsibility for cleaning up the vast majority of the contamination at the McColl Site, thereby establishing a precedent that places the bulk of cleanup costs from wartime activities on individual companies rather than on society as a whole.

The number of potentially contaminated sites associated with wartime activities and other defense-related efforts is suggested by the federal government's own cleanup activities. The Department of Defense has already investigated or otherwise addressed contamination at over 25,000 sites associated with military or other defense-related activities, including nearly 3,000 Formerly Used Defense Sites which were previously owned, leased or operated by the Department of Defense. U.S. Dep't of Defense, *Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress* 33 (2002). The Department of Defense has estimated that the cost of cleaning up the Formerly Used Defense Sites alone may be $15 to 20 billion. General Accounting Office, *Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup* 1 (2002).

Similarly, the Department of Energy has undertaken extensive efforts "to mitigate the risks and hazards posed by the legacy of nuclear weapons production." Office of Envtl. Mgt., U.S. Dep't of Energy, *Linking Legacies: Connecting the Cold War Nuclear Weapons Production Processes to Their Environmental Consequences* 1 (1997). Nuclear weapons production activities have resulted in a legacy of 1.5 billion cubic meters of

contaminated water and 73 million cubic meters of contaminated solid media. *Id.* at 71. This contamination is found, among other places, at sites that are being cleaned up by the U.S. Army Corps of Engineers (the "Corps") under the Formerly Used Sites Remedial Action Program ("FUSRAP") at a cost of up to $2.89 billion. U.S. Army Corps of Engineers, *Formerly Used Sites Remedial Action Program (FUSRAP): Report to Congress* 3 (1997). The Corps has clearly stated its intent to seek reimbursement of these cleanup costs from any private parties that may be liable for such costs under CERCLA. *Id.* at 32. Such cost recovery efforts by the federal government will almost certainly give rise to additional claims regarding the government's status as an "arranger" or "operator" that will be subject to the standards enunciated by the Ninth Circuit in this case.

Moreover, as discussed below, the Ninth Circuit's ruling may well affect even more broadly the determination of which non-governmental parties – including "arrangers," "operators" and others – are generally liable for cleaning up contaminated sites under the CERCLA program. There are thousands of contaminated sites around the country, not involving past activities of the government, that may give rise to claims for cost recovery or contribution under CERCLA. For example, as of October 1, 2002, there were 1,234 sites on the National Priorities List ("NPL"), which includes the sites that the U.S. Environmental Protection Agency ("EPA") has determined pose the highest risk to human health and the environment. *National Priorities List for Uncontrolled Hazardous Waste Sites*, 67 Fed. Reg. 65,315, 65,317-18 (2002). EPA has estimated that, through Fiscal Year 1998, potentially responsible parties had committed to conduct $15.5 billion in cleanups at such "Superfund"

sites while EPA itself has spent $16 billion to fund cleanups. General Accounting Office, *Superfund: Progress and Challenges*, Testimony of David G. Wood, Associate Director, Before the U.S. Senate Committee on Environment and Public Works 7 (1999). Moreover, a congressionally-authorized study recently concluded that the total cost to fund cleanups at these sites from Fiscal Year 2000 through Fiscal Year 2009 could be as much as an additional $18.3 billion. Resources For the Future, *Superfund's Future: What Will It Cost?* xxiii (2001). Thus, the amounts at stake in cost recovery and contribution claims under CERCLA will continue to be enormous and the issue of "arranger" liability will undoubtedly recur with frequency in connection with such claims even when the government is not a potentially responsible party.

In short, the decision of the Ninth Circuit in this case is likely to have wide-ranging impacts, potentially affecting the allocation of cleanup costs totaling billions of dollars at thousands of contaminated sites across the country. The issues raised by the Ninth Circuit's ruling are consequently of tremendous import for industry and for the nation as a whole.

B. The Ruling Will Affect Determinations of Liability In a Wide Variety of Contexts

The impact of the Ninth Circuit's decision will almost certainly extend beyond the bounds of "arranger" liability. For example, the criteria for determining the extent of liability in many other areas of CERCLA jurisprudence involve concepts of control or authority to control activities that are very similar to the standards for determining "arranger" liability under that law. In particular, the courts have held that liability as an "operator" under section 107(a) of CERCLA is

determined based on a party's actual control over a facility or its authority to control the disposal of hazardous substances. *See, e.g., East Bay*, 142 F.3d at 484-85. This test is very similar to the test established in some circuits for determining "arranger" liability, *see, e.g., TIC*, 68 F.3d at 1087-88, differing only in that the decision as to whether "operator" or "arranger" liability applies to a particular party generally depends on whether the hazardous substances were disposed of at the party's facility (resulting in possible "operator" liability) or at an off-site location (resulting in possible "arranger" liability). Thus, the Ninth Circuit's ruling likely will have substantial implications for determinations of "operator" liability under CERCLA as well.

The Ninth Circuit's ruling may also impact the CERCLA liability of many other parties - including financial institutions or commercial lenders, corporate parents, officers and directors - whose liability for cleanup costs may depend on the extent of their participation in the management of a facility or on their authority to control activities at a facility. For instance, CERCLA provides that commercial lenders may be held liable as "operators" if they participate in the management or operational affairs of a facility. *See* 42 U.S.C. § 9601(20)(F). Similarly, this Court has held that a corporate parent can be liable for disposal of hazardous substances by a subsidiary if the parent exercised a sufficient degree of control over the facility that produced the hazardous waste. *United States v. Bestfoods*, 524 U.S. 51, 71 (1998) ("*Bestfoods*"). *See also Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937 (8th Cir. 1995) (president of corporation held liable as an "operator" under CERCLA based on his control of facility operations).

The concept of imposing liability for the effects of pollution based on a party's control of, or authority to control, the facility generating the pollution even extends beyond CERCLA and is embodied in many other environmental statutes. For example, liability has been imposed on operators of facilities under the federal Resource Conservation and Recovery Act based on the extent of a party's control of or authority to control operations at a facility. *See United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1070 (D. Colo. 2000), *aff'd*, 303 F.3d 1232 (10th Cir. 2002) ("*Power Eng'g*"). Likewise, the courts have imposed "operator" liability for violations of the federal Clean Air Act on parties based on a significant degree of control over a facility. *See, e.g., United States v. Anthony Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 333 (3d Cir. 1998). In making these determinations, the courts have looked to decisions on "operator" liability under CERCLA - including this Court's decision in *Bestfoods* - in light of the similarities in language among environmental statutes and their shared broad remedial purposes. *See id.* at 334; *Power Eng'g*, 125 F. Supp. 2d at 1070 ("Although these tests have been devised to determine whether an individual or entity is an 'operator' under [CERCLA], there is no reason not to apply them to the 'operator' inquiry under the RCRA given the similarity of the definitions in both statutes."). Thus, it is reasonable to conclude that the Ninth Circuit's decision in this case, while arising in the context of "arranger" liability under CERCLA, may well have broader ramifications.

II. THE NINTH CIRCUIT RULING EXPOSES MANUFACTURING INDUSTRIES THAT DO BUSINESS WITH THE UNITED STATES TO UNREASONABLE AND INEQUITABLE RISKS OF LIABILITY

The ruling of the Ninth Circuit creates a significant and unreasonable risk that manufacturing industries, such as the petroleum and natural gas industry, that may be called on or encouraged to do business with the United States in order to further important national goals will be exposed to potentially enormous liability for environmental contamination that is largely attributable to the government itself. The Ninth Circuit's decision sends a clear message to manufacturing industries that the federal government will not take - and will not be required by the courts to take - responsibility for the long-term environmental consequences of activities undertaken by private industry at the behest of the United States, even where the government has made critical decisions and exercised substantial control over the activity resulting in the contamination. In so doing, the decision compounds the fundamental inequity of this result because it may put industry in the position of having no acceptable choice but to accept these liability risks.

At first glance, companies would appear to have at least two options in responding to the specter of multi-million dollar liabilities for environmental cleanup associated with production of equipment or material for the United States, *i.e.*, voluntarily accepting the risk of liability despite its unfairness, or simply refusing to do business with the United States. However, this is really a Hobson's choice. On the one hand, although a company could choose to accept the risk of liability for cleaning up

contamination that is ultimately the product of decisions made by the federal government, that outcome is decidedly inequitable and potentially enormously expensive. On the other hand, the alternative - avoiding liability by refusing to do business with the United States and thus refusing to contribute to national security or other important national goals - would be simply unacceptable for companies striving to be good corporate citizens. (In fact, the oil and natural gas industry's historic cooperation with the government during previous national crises demonstrates such a commitment to good corporate citizenship.) Moreover, the "option" of not doing business with the United States may be overshadowed, as it was during World War II, by the threat of government seizure of a facility that refuses to participate voluntarily in the government's efforts; or that "option" may simply not exist if the government has ordered the company to comply with government directives.[4]

The current war on terrorism and increased emphasis on homeland security demonstrate that the timing and nature of national emergencies cannot be predicted with any certainty. Industry may be called on at any time to provide necessary equipment or other materials to wage war, combat the effects of biological or chemical weapons or provide security for the nation's infrastructure. If industry plays its part in such situations

---

[4] The United States in fact exercised both types of authority on occasion during World War II. *See, e.g., War Production Board*, 13 Geo. Wash. L. Rev. at 9-10 (discussing "compulsory orders which must be accepted under penalty of plant seizure and criminal sanctions"). Thus, in any future national emergency, potential government seizure of an industrial facility would not be seen as merely a hypothetical possibility.

willingly - as it has done consistently in the past - or is compelled by the government to provide essential goods and services, it should not be penalized by being forced to bear sole responsibility for multi-million dollar cleanups of environmental contamination largely attributable to the government's own decisions. Such an outcome undermines one of the primary goals of CERCLA - *i.e.*, the equitable distribution of cleanup costs. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1185 (9th Cir. 2000) ("To leave one party shouldering the entire cost of investigation and remediation while another rides for free frustrates th[e] goal [of imposing the ultimate cost of cleanup on the parties responsible for the contamination], rather than ensuring that those who caused the contamination pay their fair share of the costs associated with clean-up.")

Accordingly, the Court should grant the writs to address the impact of the Ninth Circuit's ruling in creating inequities in future commercial relations between vital industries and the federal government.

CONCLUSION

The decision of the Ninth Circuit will have potentially wide-ranging implications in determining who will bear the cost of cleaning up the legacy of decades of production efforts undertaken by industry on behalf of the United States to defend the country. In addition to its implications for activities undertaken in the past, the decision will also impact the relationship of industry and the federal government in the future, particularly in times of war or other national emergencies. Moreover, the decision could affect the scope of liability under CERCLA even more generally and may well affect the scope of liability under other

environmental statutes. Given the very significant import of the Ninth Circuit's decision, the Court should grant the writs in order to provide guidance to the lower courts on these critical issues.

Dated: December 2, 2002

Respectfully submitted,

Daniel M. Steinway
Thomas C. Jackson*
Adam S. Vann
Kelley Drye & Warren LLP
1200 19th Street, NW, Ste 500
Washington, DC 20036
(202) 955-9600

G. William Frick
Ralph J. Colleli Jr.
Erik Milito
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Counsel for Amicus Curiae
*Counsel of Record**

Supreme Court U.S.
FILED
DEC 15 2002
OFFICE OF THE CLERK

No. 02-500

IN THE
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI

JEAN A. MARTIN
ATLANTIC RICHFIELD COMPANY
333 South Hope Street
Los Angeles, CA 90071
(213) 486-0761
Counsel for Petitioner Atlantic Richfield Company

CHARLES G. LAMBERT
CHEVRONTEXACO CORPORATION
2613 Camino Ramon
San Ramon, CA 94583
(925) 973-4546
Counsel for Petitioner Texaco, Inc.

CARTER G. PHILLIPS*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

KATHERINE L. ADAMS
DAVID H. BECKER
SIDLEY AUSTIN BROWN & WOOD LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
Counsel for Petitioners Atlantic Richfield Company and Texaco, Inc.

* Counsel of Record

December 17, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR CERTIORARI 1

1. The Ninth Circuit's Analysis Of Arranger Liability Differs From The Approach Taken By All Other Circuits That Have Considered The Question 2

2. The United States Sanitizes The Historical Context In Which The Acid Waste Disposal Took Place, Attempting To Give The Impression That Refining Petroleum During World War II Was "Business As Usual" 3

3. The Evidence Is Equally Clear That The United States Exercised Substantial Control Over The Means For Disposal Of Acid Waste During World War II 7

4. The United States Unfairly Characterizes The Oil Companies' Motives In Becoming Involved In Avgas Production 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — Page

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 9
Florida Power & Light Co. v. *Allis-Chambers Corp.*, 893 F.2d 1313 (11th Cir. 1990) 3
United States v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) 2
United States v. *Monsanto Chem. Co.*, No. 99-63-WLB (S.D. Ill. filed Mar. 15, 2000) 1
United States v. *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) 2
United States v. *TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995) 2, 3

STATUTES

Priorities Statute, ch. 440, 54 Stat. 676 (1940) 4
Selective Training and Service Act of 1940, ch. 720, 54 Stat. 892 4
An Act to Expedite the National Defense and for Other Purposes, ch. 157, 55 Stat. 236 (1941) 4
Second War Powers Act, ch. 199, 56 Stat. 176 (1942) 4

SCHOLARLY AUTHORITY

John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies & Procedures*, 13 Geo. Wash. L. Rev. 1 (1944) 4, 5, 6, 10

REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR CERTIORARI

This case is about what level of control over disposal of hazardous waste is sufficient to make a party liable as an arranger under CERCLA. Every circuit except the Ninth considers all potentially relevant indicators of control in determining whether the causal connection between the actions of a party and the disposal of hazardous waste is sufficient to make that party liable under CERCLA § 107(a)(3). In contrast, the Ninth Circuit identified and considered only a few, specific forms of control in deciding that the United States was not liable as an arranger. The Ninth Circuit simply did not consider all of the circumstances that show the United States is indeed liable as an arranger. The United States Opposition brief ("Opp.") makes the same error by failing to consider all the facts in conjunction with one another and divorcing them entirely from the unique historical context of industrial regulation during World War II.

Wartime production by the United States and private companies on its behalf left a legacy of hazardous waste which the government and private parties are still addressing sixty years later. More than $1 billion in liability for these cleanups turns on whether the government's control over industrial operations during wartime emergencies can give rise to liability under CERCLA for "otherwise arranging" for the disposal of hazardous waste. For good reason, the United States does not challenge the importance of this issue for resolving pending and future claims.[1] This case provides an

---

[1] Petitioners note that, in addition to the cases cited at Pet. App. 120a-23a, there is at least one additional case pending involving a claim that the United States is liable as an arranger under CERCLA. *See United States* v. *Monsanto Chem. Co.*, No. 99-63-WLB (S.D. Ill. filed Mar. 15, 2000). Although the potential cleanup costs in *Monsanto* are unknown, the plant at issue was for years the nation's largest single manufacturer of PCBs.

excellent vehicle for this Court to clarify the meaning of "arrange" in CERCLA § 107(a)(3) and aid lower courts in deciding liability for and allocation of the costs of responding to the waste left from the war effort.

1. The Ninth Circuit's Analysis Of Arranger Liability Differs From The Approach Taken By All Other Circuits That Have Considered The Question.

Much of the difficulty in describing the Ninth Circuit's analysis stems from the court's failure to set out any applicable standard. Instead, it relied on ad hoc comparisons to cases on arranger liability from other circuits. The Ninth Circuit interpreted the Eighth Circuit's decision in *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), to stand for the proposition that arranger liability arises from ownership of the hazardous materials that are disposed of at another's facility. The court interpreted *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), to mean that arranger liability arises if a party has direct control over the disposal arrangements. Its initial conclusion that there was no arranger liability in this case was based on finding that these two, specific forms of control were not present in this case. See Pet. App. 18a, 21a.[2] The court emphasized that those two factors are determinative by citing a district court case which states that courts had only found arranger liability when a "party either was the source of the pollution or managed its disposal by the arranger." *Id.* at 21a-22a.

The Ninth Circuit's approach contrasts most starkly with the flexible approach articulated by the Eighth Circuit in *United States* v. *TIC Investment Corp.*, 68 F.3d 1082 (8th Cir.

---

[2] In this Reply, Petitioners' citations to the opinions below are to their Petition No. 02-500, and citations to the factual record will be to the Lodging ("L") with this Court by Petitioners Shell Oil Company and Union Oil Company, which accompanied their Petition No. 02-506.

1995), a case which neither the Ninth Circuit nor the United States analyzed. In *TIC*, the Eighth Circuit stated that liability as an arranger under CERCLA § 107(c)(3) attaches if a party "had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal." *Id.* at 1089. Thus, the United States's arguments that it lacked direct control over waste disposal at the McColl Site, Opp. 9, simply illustrate the inconsistency between the Ninth Circuit's focus on particular types of direct control and the recognition by other circuits that even indirect control can give rise to arranger liability. See *TIC*, 68 F.3d at 1089, 1090 n.7; *Florida Power & Light Co.* v. *Allis-Chambers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990) (a party may be liable as an arranger even though it "does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed").

A careful reading of the Ninth Circuit's opinion in this case shows that it narrowed substantially the analysis for arranger liability that other circuits apply. Moreover, the totality of the circumstances in this case shows that the United States exercised extensive and pervasive control over aviation gasoline ("avgas") production and controlled the available means for disposing of waste generated from that process.

2. The United States Sanitizes The Historical Context In Which The Acid Waste Disposal Took Place, Attempting To Give The Impression That Refining Petroleum During World War II Was "Business As Usual."

The United States fails to synthesize how the various pieces of evidence interact with the backdrop of pervasive and unprecedented control present during the war. Notwithstanding overwhelming historical evidence to the contrary, the United States pretends that its procurement of avgas from

the Oil Companies[3] during World War II was an ordinary, arms-length contractual relationship in a conventional free market. Nothing could be further from the truth.

The general counsel of the War Production Board ("WPB") and former assistant general counsel wrote an article in 1944 that describes the wartime controls that ensured the production of items needed for military use by the United States and its Allies. John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies & Procedures*, 13 Geo. Wash. L. Rev. 1 (1944) (lodged with the Court together with this Reply Brief ("Pet. Reply L.")). Their article details the laws and orders that made the WPB's power over industrial production "virtually unconditioned and unlimited in extent." *Id.* at 19.

To prepare for war, the authors explain that "at least two basic powers were urgently needed by the Federal Government, (1) the power to control and to direct the distribution of scarce materials and products of all kinds ... and (2) the power to allocate the use of the nation's productive facilities." Pet. Reply L. 7. Shortly after President Roosevelt declared a national emergency in 1939, Congress enacted a defense priorities system to allocate scarce but essential raw materials to companies that agreed to manufacture goods for the United States military. Priorities Statute, ch. 440, 54 Stat. 676 (1940); see Pet. Reply L. 8. Congress then passed the Selective Training and Service Act of 1940, ch. 720, § 9, 54 Stat. 885, 892, establishing penalties for any company that refused to manufacture items for the military, including seizure of plants, fines, and imprisonment for company officials. See Pet. Reply L. 9-10. A subsequent amendment to the Priorities Statute, ch. 157, 55 Stat. 236 (1941), gave "the executive one of the most, if not the most sweeping grant of authority in our history." Pet. Reply L. 10. And under the Second War

---

[3] Petitioners Atlantic Richfield Company, Texaco, Inc., Shell Oil Company and Union Oil Company.

Powers Act, ch. 199, 56 Stat. 176 (1942), "the power to allocate materials was expanded to include a similar power to allocate facilities, an authority which has since been widely exercised." Pet. Reply L. 12.

Under these laws, the parties agree that the United States had the "authority to place obligatory product orders" for avgas, which a refinery had to fill if it had the technical capacity to do so. See Stips. 43, 200 (L 13-14, 46). The parties also agree that the United States controlled priority allocations for scarce materials that refineries needed to stay in operation, and made decisions that approved or denied refinery requests for such items.[4] The United States could shut down operations at a particular refinery by denying its request for a priority right to obtain raw materials, see *infra* at 6, and it could issue direct orders to limit or stop production of "nonessential" items at a refinery. See Stips. 82-88 (L 21). Refineries that failed to comply with orders were subject to seizure and criminal penalties. See Stips. 43, 59 (L 13-14, 16).

This coercive regime fundamentally changed the terms of national industrial production. The United States admitted it had the power to compel a refinery to maximize the production of avgas (if it had the capacity to produce), and the United States was prepared to use its power to maintain maximum production at almost any cost. See Stips. 200-204 (L 46-47); L 171-72. Moreover, the United States was fully aware of the environmental consequences of this increase in production, recognizing that the burgeoning "production of aviation gasoline would increase the amount of spent alkylation and acid sludge produced." Stip. 338 (L 76). Monroe Spaght of the Shell Oil Company testified that, although he had raised concerns about how to dispose of acid sludge with

---

[4] *See* Stips. 55 (L 15 – raw materials), 66 (L 18 – acid and construction materials), 86-88, 212, 237 (L 21, 49, 57-58 – avgas components), 128 (L 31 – allocation of crude oil to refineries making avgas).

the government regulatory committees, the United States would not allow operations to be shut down. See L 177. He stated that "with all of the things that had been done through the years to increase aviation gasoline production, you would not let a thing like this acid problem stop you. That would be the last thing that would be allowed." *Id.* at 178. When asked if those were his instructions from the government, he replied, "[a]bsolutely." *Id.*

Overarching government control over wartime avgas production was confirmed at trial by J. Howard Marshall, general counsel for the Petroleum Administration for War ("PAW"). He testified that if a refiner had come to the PAW seeking to stop producing avgas because of its hazardous by-products, he would have "[t]old him to make it anyway." L 175. Furthermore, Mr. Marshall testified that if a refiner had sought to opt out of the avgas program, the PAW "would have shut him down; take away his materials and supplies. You didn't have to take him to court, for which I was fortunate. I just took away his materials and priorities. Usually you couldn't operate a week without it." *Id.* at 173.

Control exists by virtue of one having power over another, whether that power is exercised or not. The government had comprehensive power to seize factories, impose criminal sanctions, or shut down companies by issuing orders denying them access to scarce materials. See Pet. Reply L. 12, 47-48, 51. Respondent's protests that it rarely exercised its power to seize refineries are irrelevant to whether or not it exercised control. See Opp. 5 & n.5, 17 n.13. It is no wonder that companies complied with the government orders under these circumstances.[5]

---

[5] In light of these stipulations and the government's total control over industrial production during World War II, the government's statement that the United States controlled the specifications, quantities, delivery, and price of avgas "only in the sense that every party controls the terms on which it chooses to contract" is a profound distortion of the facts and the record. Opp. 17; *see* Stips. 119, 221 (L 28, 51-52)

3. The Evidence Is Equally Clear That The United States Exercised Substantial Control Over The Means For Disposal Of Acid Waste During World War II.

Through its pervasive control over resource allocation during World War II, the United States controlled total avgas production and then restricted the alternatives available for disposal of the huge volumes of acid waste that resulted from avgas production. As the United States acknowledges, it is irrefutable that all industries seeking to use scarce materials during World War II were required to obtain approval from the WPB. See Opp. 10. All WPB decisions regarding construction of waste reprocessing facilities, waste storage tanks, new tank cars, or the use of existing tank cars were made pursuant to the WPB's powers to allocate scarce resources for the war effort. See Stips. 340-342 (L 76).

Even in 1942, it was clear that the Oil Companies viewed dumping to land as a "last resort," used when access to other options was unavailable. Stips. 489-490 (L 125-27). When the United States withheld access to scarce resources needed to store, reuse, or reprocess all avgas waste, dumping became the only available option.[6]

Petitioners exhausted their ability to store acid waste at their plants during the war.[7] The WPB knew that storage capacity was limited, and that local facilities for reprocessing

---

[6] The United States unfairly conflates burning and dumping in describing the means by which the Oil Companies disposed of acid waste before, during, and after the war. *See* Opp. 8, 10, 11. By using the terms together, Petitioner cites to fact stipulations that involve burning alone as support for its "facts" about acid waste dumping. *See* Stips. 506-509 (L 131). Burning of acid waste is not an issue in this case.

[7] For example, annual acid use increased five-fold during the war at the Shell refinery. Only 10% of the acid is consumed during production, and the other 90% must leave the refinery after use. *See* Stips. 319-322 (L 72-73).

the waste into fresh acid were insufficient to handle all the Oil Companies' waste. See Stips. 373-374 (L 83-84). Nevertheless, the WPB rejected a Texaco proposal to build a reprocessing facility for acid waste, see Stips. 379-381 (L 85-87), and it rejected a Shell Oil proposal to build a similar facility in Texas, noting that waste processing plants would tie up strategic materials and equipment needed for other wartime priorities. See L 235-37. The WPB also failed to make tank cars available to transport the waste to facilities that could reuse it in fertilizer manufacture.[8] After helping petitioners locate a tank to store spent acid at the end of the war, the WPB failed to locate or allocate priorities needed to store the remaining acid sludge waste.[9]

The above evidence is missing from the United States's Opposition brief, and the United States takes the same liberties with the factual record regarding waste disposal alternatives as the Ninth Circuit did. After the allocation trial, the district court declared that it was "convinced that the Oil

---

[8] Richard Smith, the WPB official sent to monitor acid waste, noted that the ability to ship acid sludge to a fertilizer factory for reuse was dependent on the availability of lead-lined tank cars to transport the waste. He testified that "the immediate cause of Union's dumping was a shortage of tank cars," Stip. 402 (L 93); *see* Stip. 395 (L 92), and that Shell apparently dumped for the same reason. *See* L 239; *see also id.* at 237 (describing the shortage of tank cars to carry fresh acid or acid waste). The parties agreed there was a shortage of tank cars during the war. *See* Stips. 417-419 (L 96). The United States gave tank car priority to the transport of fresh acid needed for military production, not the transport of acid waste.

[9] The United States claims that the "dumping ended after petitioners reached agreement with another company for temporary use of a storage tank," a transaction that WPB and PAW helped arrange. Opp. 10 (citing Stips. 366-371 (L 81-83)). In fact, the tank was not available until April 1945, and it only stored spent acid, not sludge. Since petitioners continued to reuse spent acid wherever possible in their refineries, they continued to generate acid sludge that required some form of disposal. *See* Stips. 369-371, 375 (L 82-83, 84). The WPB and PAW did not locate any other storage options.

Companies had no reasonable recourse to on-land dumping of the sludge due to the conduct of the WPB." Pet. App. 76a. The trial court's finding, based on stipulated facts and trial testimony, is amply supported.[10]

The United States scoffs that Petitioners are arguing that it is liable for the disposal of all waste produced by a closely-regulated industry. See Opp. 19. This is not the argument at all. Petitioners contend that the United States is liable for the disposal of waste under wartime controls where the United States *both* drove the refineries to increase avgas production, resulting in acid waste at levels that quickly exceeded the refineries' pre-war capabilities to handle, *and* exercised its unique wartime powers to foreclose the refineries' ability to arrange more benign means of disposal. If the Ninth Circuit had looked fairly at the sum of all the facts in this case, it would have held that the United States arranged for the disposal of hazardous waste.

4. The United States Unfairly Characterizes The Oil Companies' Motives In Becoming Involved In Avgas Production.

The United States unfairly impugns the Oil Companies' motives for producing avgas as part of the war effort. See Opp. 6-7, 16-17, 19. The Oil Companies answered President Roosevelt's call, along with the rest of the nation, to commit themselves to the cause of freedom in the effort to defeat the Axis nations. The general counsel for the WPB and his former assistant lauded companies that wholeheartedly threw themselves into the war effort, writing that "[t]he conversion

---

[10] Although Respondent twice quotes the court of appeals's remarkable, contrary conclusion that "undisputed facts" suggest otherwise, Opp. 15, 18, the court of appeals was not entitled "to reverse the findings of the trier of fact simply because it [was] convinced that it would have decided the case differently." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). The Ninth Circuit did not even purport to engage in "clearly erroneous" review of the facts.

of American industry from civilian to war production is an achievement in which American businessmen may take justifiable pride." Pet. Reply L. 4.

The United States's characterization of the Oil Companies as having solely economic motives for their involvement in avgas production verges on insulting, particularly because this nation could not have defeated Japan and Germany without the Oil Companies' efforts six decades ago. Petitioners do not dispute that they entered into voluntary contracts for avgas production, nor that they were willing participants in the war effort. Nor do Petitioners dispute their own CERCLA liability for the McColl Site. But they do contend that the overarching economic controls developed by the United States during the war became something no contractor reasonably could have envisioned before the war. Subsequent decisions of the immensely-powerful regulatory agencies that not only pressed the refineries to produce as much avgas as possible (and hence more waste than they could handle) but also withheld from the refiners the means to dispose of waste without dumping make the United States liable under CERCLA § 107(a)(3). Justice requires that the United States shoulder its fair share of the environmental costs of prosecuting the war.

CONCLUSION

For the reasons set forth in the Joint Petition and herein, the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

JEAN A. MARTIN
ATLANTIC RICHFIELD COMPANY
333 South Hope Street
Los Angeles, CA 90071
(213) 486-0761
Counsel for Petitioner Atlantic Richfield Company

CHARLES G. LAMBERT
CHEVRONTEXACO CORPORATION
2613 Camino Ramon
San Ramon, CA 94583
(925) 973-4546
Counsel for Petitioner Texaco, Inc.

CARTER G. PHILLIPS*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

KATHERINE L. ADAMS
DAVID H. BECKER
SIDLEY AUSTIN BROWN & WOOD LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
Counsel for Petitioners Atlantic Richfield Company and Texaco, Inc.

* Counsel of Record

December 17, 2002